No. 98-93-CFX Title: Robert Rubin, Secretary of Treasury, et al., Petitioners
v.
United States, through the Independent Counsel

Docketed:
July 16, 1998 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jul 16 1998	Petition for writ of certiorari filed. (Response due August 15, 1998)
	Jul 16 1998	Motion of petitioner to permit initial filing of typewritten petition for a writ of certiorari filed.
	Jul 16 1998	Application (A98-53) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
	Jul 16 1998	(A98-53) Opposition to Application filed
	Jul 17 1998	(A98-53) Reply to Opposition filed by the Solicitor General
	Jul 17 1998	(A98-53) Application for stay denied by the Chief Justice in an in Chambers Opinion
	Jul 17 1998	Brief of respondent United States in opposition filed.
	Jul 29 1998	DISTRIBUTED. September 28, 1998
	Aug 11 1998	Reply brief of petitioners Robert E. Rubin, Secretary of Treasury, et al. filed.
	Oct 5 1998	REDISTRIBUTED. October 9, 1998
	Oct 13 1998	REDISTRIBUTED. October 16, 1998
	Oct 20 1998	Record filed.
	Oct 26 1998	REDISTRIBUTED. October 30, 1998
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	Petition DENIED. Dissenting opinion by Justice Ginsburg. Dissenting opinion by Justice Breyer. (Detached opinion.)
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	Dec 10 1998	Record returned to USCA District of Columbia 2 envelopes(SEALED)

Supreme Court, U.S.
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98-93 JUL 16 1998

OFFICE OF THE CLERK

No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

STEPHEN W. PRESTON
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

EDWARD S. KNIGHT
General Counsel
Department of the Treasury
Washington, D.C. 20220

32 pp

QUESTION PRESENTED

Whether, under Rule 501 of the Federal Rules of Evidence, a protective function privilege should be recognized in response to grand jury subpoenas for the testimony of Secret Service officers concerning information they learned while in proximity to the President of the United States for the purpose of protecting him.

PARTIES TO THE PROCEEDING

The United States, acting through the Secretary of the Treasury and the Director of the Secret Service in their official capacities, has invoked the testimonial privilege at issue here. The Independent Counsel, who is empowered to exercise specific prosecutorial functions on behalf of the United States, has challenged the existence of the privilege. To avoid confusion and unnecessary debate in naming the parties, we identify petitioners as Robert E. Rubin, Secretary of the Treasury, and Lewis C. Merletti, Director of the Secret Service, in their official capacities. We identify respondent as the United States acting through the Independent Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Treasury and the Director of the Secret Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court on petition for rehearing and

suggestion for rehearing en banc (Pet. App. 28a-36a) are not yet reported. Portions of the district court's opinion and the record remain under seal.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing was denied on July 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article II, Section 1 of the Constitution provides:

The executive Power shall be vested in a President of the United States of America.

Title 18, Section 3056 of the United States Code provides:

(a) Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons:

(1) The President, the Vice-President (or other officer next in the order of succession to the Office of the President), the President-elect, and the Vice-President-elect.

* * * * *

The protection authorized in paragraphs (2) through (7) may be declined.

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[1] We have reproduced in the appendix redacted versions of the district court opinion and order. The unredacted versions are reproduced in the sealed appendix to respondent's petition for a writ of certiorari before judgment in the court of appeals. See *United States* v. *Rubin*, No. 97-1942 (cert. denied without prejudice June 4, 1998).

Rule 501 of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. * * *

STATEMENT

This case presents an issue of extraordinary national importance. The United States, through the Independent Counsel, has moved the United States District Court for the District of Columbia to compel Secret Service personnel to testify before a grand jury about information that they, or other Secret Service personnel, learned while protecting the President of the United States. The Secretary of the Treasury, on behalf of the United States, has formally asserted the protective function privilege based on the professional judgment of the Secret Service that, if the courts refuse to recognize the privilege, the destruction of the relationship of confidence and trust between a President and his protectors would seriously impair the Service's future ability to protect those who serve as the Nation's Chief Executive. The district court refused to recognize any form of protective function privilege and granted petitioner's motion to compel. The court of appeals has affirmed the order granting the motion to compel.

1. Under the Constitution, the President is the sole repository of the "executive Power" of the United States, U.S. Const. Art. II, § 1. By virtue of the critically important Office that he holds, the President is subject to unique and mortal jeopardy—jeopardy that in turn threatens the Nation's democratic institutions and national security. The Nation has learned through the wrenching experience of four presidential assassinations that the Chief Executive's life is constantly at risk. Because threats to a sitting President's personal safety pose such grave national security concerns, Congress has provided for the Secret Service to protect the President and has directed the President to accept its protection. See 18 U.S.C. 3056(a). Congress's mandate entails an extraordinary and unremitting intrusion into the most intimate aspects of his life.

The Secret Service assumes full responsibility for protecting the President from every conceivable threat of attack. Pet. App. 41a, 45a-48a (Declaration of Lewis C. Merletti, Director, United States Secret Service ¶¶ 7, 14-17). By focusing all-encompassing attention on the President's security, the Service seeks to relieve the President of apprehensions about his own personal safety and to allow him to focus his attention on his official duties. See *id.* at 49a-50a, 52a (Merletti Decl. ¶¶ 18, 22). The Service has adopted a protocol for protection that places an absolute premium on continual and unquestioned physical proximity. *Id.* at 41a, 45a-47a, 49a-51a (Merletti Decl. ¶¶ 7, 15, 18-19). Under its "cover and evacuate" protective strategy, Secret Service personnel form a moving protective perimeter surrounding the President at all times, prepared to react instantaneously in the event of an attack. *Ibid.*; see also *id.* at 80a (Declaration of

Eljay B. Bowron, former Director, United States Secret Service ¶ 5); *id.* at 88a (Declaration of John W. Magaw, former Director, United States Secret Service ¶ 4).

The Secret Service's success depends critically upon the ability of its personnel to maintain constant close proximity to the President. As the current Director of the Secret Service has emphasized, tragedy can result when "as little as a few feet" separate the President from his protectors. Pet. App. 57a-58a (Merletti Decl. ¶ 28). Secret Service protective personnel must remain near on occasions of confidential and intimate conversation and, as a result, are at the President's side during top secret discussions, diplomatic exchanges, sensitive conversations, and matters of personal privacy. *Id.* at 51a-52a (Merletti Decl. ¶ 21). That level of proximity can be maintained only in an atmosphere of complete trust between the President and his protectors. *Id.* at 49a-50a, 55a-58a (Merletti Decl. ¶¶ 18, 27-28).

The relationship of trust that exists between the Secret Service and the President rests on the understanding that Secret Service personnel will keep absolutely confidential information they learn in the course of protecting him. Recognizing that confidentiality is essential to its mission, the Secret Service reported, as early as 1910, that "the men of this service detailed at the Presidential home in Washington or elsewhere are instructed not to talk of anything they may see or hear. So far as the actions of the President and his family and social and official callers are concerned the men are deaf, dumb and blind." Pet. App. 70a.

2. The Special Division of the United States Court of Appeals for the District of Columbia Circuit has

conferred jurisdiction on the Independent Counsel to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones* v. *Clinton*." Pet. App. 97a (Order, Division No. 94-1 (filed Jan. 16, 1998)). The Independent Counsel has represented that his investigation in this regard centers on whether the President had a sexual relationship with Lewinsky and attempted to conceal that relationship in proceedings arising from the since dismissed *Jones* v. *Clinton* lawsuit. See *Jones* v. *Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998) (appeal pending in the 8th Circuit).

In the course of that investigation, the Independent Counsel has sought documents from the Secret Service, which has cooperated with respondent and provided all requested, non-privileged information. The Independent Counsel also has conducted numerous interviews and depositions of Secret Service protective personnel, including several Secret Service officers whose duties involve direct proximity to the President of the United States. Those persons declined, under a claim of privilege, to disclose information that they or other Secret Service personnel learned while in proximity to, and in the course of protecting, the President. In response, the Independent Counsel filed a motion to compel their testimony before the grand jury. Pet. App. 1a.

Acting through the Attorney General, the United States opposed the motion. The Secretary of the Treasury, who is vested by Act of Congress with responsibility for supervising the Secret Service, 18

U.S.C. 3056(a), submitted a declaration that formally invoked a protective function privilege against the disclosure of the requested testimony. Pet. App. 94a-95a (Declaration of Robert Rubin, Secretary of the Treasury). The Attorney General, who also has responsibility for protecting the President, see 28 U.S.C. 533(2), likewise determined that the compelling interest in protecting the safety of the President called for assertion of the privilege. See Opposition to the Independent Counsel's Motion to Compel at 32.

The Director of the Secret Service submitted a separate declaration describing the need for the privilege. Pet. App. 37a-60a (Merletti Decl.). The Director explained, with supporting exhibits, that the Secret Service's "cover and evacuate" protective strategy requires agents and officers to be near the President at all times and that close proximity of those personnel cannot be maintained without a relationship of absolute trust and confidence. *Id.* at 41a, 49a-55a (¶¶ , 18-25). The Director concluded, based on his responsibilities as Director and his extensive first-hand experience in protecting three Presidents, *id.* at 40a (¶ 5), that compelling Secret Service personnel to disclose information learned in the course of protecting the President would damage that relationship, thereby causing the President to distance himself from his protectors. The result would be to impair the Service's ability to protect the President—and the Nation—from the risk of a presidential assassination. *Id.* at 40a, 55a-60a (¶¶ 5, 26-30). The two most recent former Directors confirmed the assessment of Director Merletti. See *id.* at 78a-79a, 82a (Bowron Decl. ¶¶ 2, 9); *id.* at 86a-87a, 91a-92a (Magaw Decl. ¶¶ 2, 12, 14, 15).

Director Merletti explained that his judgment is borne out by the Nation's tragic experience with presidential assassination attempts. Pet. App. 41a-44a, 57a-58a (Merletti Decl. ¶¶ 8-12, 28). As the Warren Commission noted, "[a]ttempts have * * * been made on the lives of one of every five American Presidents. One of every nine Presidents has been killed." *Report of the President's Commission on the Assassination of President John F. Kennedy* 504 (1964). Since 1964, Presidents Ford, Reagan, and Clinton were the targets of domestic assassination attempts, and President Bush was the target of a foreign assassination attempt. The Director described how the proximity of Secret Service agents played a decisive role in protecting President Reagan from an assassination attempt and how greater proximity might have prevented the deaths of Presidents McKinley and Kennedy. Pet. App. 42a-44a (¶¶ 10-12).

The Department also submitted a letter from former President George Bush to the Director of the Secret Service, which explained that the prospect of Secret Service testimony affects "the confidence and trust that a President must have in the [Secret Service]." Pet. App. 62a (Merletti Decl. Exh. H, Letter from George Bush to Lewis Merletti, April 15, 1998). President Bush stated that "had I felt [the Secret Service] would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in." *Id.* at 63a.

3. The district court refused to recognize the protective function privilege and therefore granted respondent's motion to compel. Pet. App. 15a-27a. Citing this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the district court acknowledged that

Rule 501 of the Federal Rules of Evidence provides that the privilege of a witness or government "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in light of reason and experience." See Pet. App. 16a. The court nevertheless refused to allow the Secret Service to invoke its protective function as a basis for privilege, relying on three grounds. First, the court observed that neither Congress nor the federal courts had heretofore recognized such a right. *Id.* at 17a-21a. Second, the court noted that the States had not created an analogous privilege for state officials. *Id.* at 21a. Third, the court concluded—contrary to the professional judgment of the Secret Service and the considered opinion of a former President—that breaches of the traditional confidential relationship would not "lead a President to 'push away' his protectors" (*id.* at 23a). See *id.* at 22a-24a.

Petitioners filed a notice of appeal and a motion to expedite briefing in the court of appeals. In response, the Independent Counsel filed a petition for a writ of certiorari before judgment in the court of appeals. Petition for Writ of Certiorari in *United States* v. *Rubin*, No. 97-1942 (petition filed June 2, 1998). This court denied the petition for a writ of certiorari without prejudice, based on its expectation "that the Court of Appeals will proceed expeditiously to decide this case," *United States* v. *Rubin*, No. 97-1942, Order (June 4, 1998). The next day, the court of appeals entered an order setting an expedited briefing and oral argument schedule. See *United States* v. *Rubin*, No. 98-3069, Order (D.C. Cir. June 5, 1998).

4. The court of appeals heard argument and entered a per curiam decision affirming the district court's order compelling the testimony of the Secret

Service agents. The panel recognized that ensuring the physical safety of the President is "a public good of the utmost importance." Pet. App. 7a. The panel nevertheless concluded that the Secret Service had not shown "with the compelling clarity required by Rule 501 that failure to recognize the proposed privilege will jeopardize the ability of the Secret Service effectively to protect the President." *Ibid.* See *id.* at 10a-12a.

The court of appeals began its analysis by rejecting the argument, pressed by the Independent Counsel and accepted by the district court, that the protective function privilege is unavailable because of "the lack of relevant federal or state precedent" for the privilege. Pet. App. 6a. The court noted that "[t]he lack of such precedent is hardly surprising * * * in view of the novelty of the [Independent Counsel's] demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President." *Ibid.* Given the unprecedented nature of the Independent Counsel's demands, the court concluded that judicial recognition of the privilege should depend on whether the Secret Service can "establish clearly and convincingly both the need for and the efficacy of the proposed privilege." *Ibid.*

The court concluded that the Secret Service had failed to carry its burden of showing that a protective function privilege "in its proposed form" would "materially enhance presidential security." Pet. App. 6a. The court stated that it "must listen with the utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President," *id.* at 7a (quoting *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969)), but it was of the view that the Secret Service's concerns "are based in large

part on speculation—thoughtful speculation, but speculation nonetheless," *id.* at 8a (quoting *Swidler & Berlin* v. *United States*, No. 97-1192 (June 25, 1998), slip op. 11. The court acknowledged the sworn affidavits of the current and former Secret Service Directors, but concluded that it "must balance" that record evidence against the statements, outside the record, of two former Presidents on television talk shows. *Id.* at 8a. In addition, the court offered its own view that the President would allow agents to maintain close proximity in light of his own interest in his personal safety. *Id.* at 8a-9a.

The court also questioned the efficacy of a protective function privilege in light of the Secret Service's proposed exception for contemporaneously recognizable felonies, the Secret Service's expectation that its agents would honor the requirement of confidentiality without signing confidentiality agreements, and the possibility that the Secretary of the Treasury could waive the privilege. Pet. App. 9a-10a. The panel also expressed doubts about the need for a privilege when the President is within the White House. *Id.* at 11a. Finally, the panel concluded that the general policy underlying 28 U.S.C. 535(b), which requires heads of departments to report evidence of criminal misconduct to the Attorney General, "weighs against judicial recognition of the privilege proposed here." Pet. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

This Court regularly decides issues of extraordinary consequence. This case is exceptional, even among those select cases that warrant the Court's review. The United States, acting through the Secretary of the Treasury, has asserted the protective

function privilege based on the Secret Service's professional judgment, derived from a century of experience in implementing the Act of Congress assigning it responsibility to protect the President, that the maintenance of strict confidentiality and a privilege against compelled disclosures are essential to prevent presidential assassinations. The court of appeals has rejected that considered judgment and declined to recognize the privilege in the context presented here, based on the court's own perspective of the Secret Service's needs. The court of appeals has fundamentally erred, and its decision portends grave consequences for the Secret Service's future ability to protect those in whom the Constitution singularly vests the Nation's executive power.

1. This case presents an issue of utmost national importance warranting review by this Court. The Independent Counsel urged this Court to issue a writ of certiorari even before the court of appeals rendered its judgment, observing that "[t]he claims of privilege in this case, while novel, are of paramount importance to the country." Petition for Writ of Certiorari in *United States* v. *Rubin*, No. 97-1942 (redacted version), at 9. He noted that "all readily agree that the physical safety of the President is a matter of urgent national and public concern." *Ibid.* Indeed, the Independent Counsel stated that "only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is a sensitive, life-or-death issue." *Id.* at 10.

The importance of this case arises not simply from its impact on the safety of the current and future Presidents, but also from its effect on the Nation's fundamental institutional interests. History leaves no doubt that the Nation will face future presidential

assassination attempts. The Secret Service stands between the Nation and the calamity of assassination. The court of appeals' refusal to recognize the protective function privilege will undermine the Secret Service's ability to step into the breach and protect the Nation from profound and predictable peril.

2. The court of appeals' decision is wrong. Drawing on this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the court of appeals identified, in general terms, the correct analytical framework. The court erred, however, in its specific assessment of the need for the protective function privilege and of the efficacy of that privilege in preserving the confidential relationship between the President and those who are charged with his protection.

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness * * * [or] government * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This Court set forth the governing principles of the common law in *Jaffee*. It stated that "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving." 518 U.S. at 9 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)), but that "[e]xceptions from the general rule disfavoring testimonial privileges may be justified * * * by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,'" *ibid.* (quoting *Trammel* v. *United States*, 445 U.S. 40, 50 (1980)).

As the court of appeals recognized, protecting the President's life is "a public good of the utmost importance." Pet. App. 7a. The President, elected to office by the people of the Nation as a whole, is alone

vested with the "executive Power," U.S. Const. Art. II, § 1, is "Commander in Chief of the Army and Navy of the United States," U.S. Const. Art. II, § 2, Cl. 1, and is the "sole organ of the nation in its external relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (citation omitted). For those reasons, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). And for the same reasons, the assassination of a President causes grave injury to the Nation's democratic institutions and traditions, threatens its security and external relations, and visits profound trauma upon its people. Indeed, as the court of appeals recently observed, "few events debilitate the nation more than the assassination of a President." *Stigile* v. *Clinton*, 110 F.3d 801, 803-804 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998); see also *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969) ("A President's death in office has worldwide repercussions and affects the security and future of the entire nation.").

The court of appeals correctly recognized that the absence of federal or state precedent has little relevance in light of "the novelty of the [Independent Counsel's] demand for testimony" and the absence of an instructive analogy to the Nation's unique and paramount interest in protecting the President from assassination. Pet. App. 6a; see Letter from Director John W. Magaw to Senator John F. Kerry, July 24, 1992, *reprinted in* C.A. Amicus Br. in Support of Secret Service, App. Tab 12 (informing Congress that "[n]o Secret Service employee has ever been required

to disclose information he or she may have overheard by virtue of a protective assignment").[2] The court therefore properly concluded that the question to be resolved is whether "recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to 'push away' his protectors in situations where there is some risk to his safety." Pet. App. 6a. But the court of appeals incorrectly answered that question, erring in three basic respects.

a. First, the court improperly rejected, as mere "speculation," the Secret Service's professional judgment respecting the need for the privilege. Pet. App. 7a-8a. The Secret Service expressed that judgment through sworn affidavits of Director Merletti and two former Directors, which reflect nearly a century of the Service's experience in protecting numerous Presidents from assassination. The Service's judgment is based on the agency's accumulated expertise, including its careful study of assassination attempts and, collectively, the individual Directors' decades of personal experience in protecting Presidents. Pet. App. 39a, 41a (Merletti Decl. ¶¶ 3, 8); *id.* at 78a-79a (Bowron Decl. ¶¶ 2-3); *id.* at 86a-87a (Magaw Decl. ¶¶ 1-2). The Independent Counsel chose to introduce no evidence whatever to the contrary. In addition, all the living former special agents in charge of protecting the President from the Eisenhower Administration

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[2] As we explain in our brief in the court of appeals (at 31-32), Director Magaw wrote that letter in response to efforts by the Senate, in POW/MIA hearings, to require a Secret Service agent to testify regarding overheard conversations involving President Bush. The Senate committee ultimately voted not to subpoena the testimony of the Secret Service agent. S. Rep. No. 1, 103d Cong., 1st Sess. 32, 284 (1993).

through the Bush Administration jointly filed an amicus brief in the court of appeals independently endorsing the Service's judgment. See C.A. Amicus Br. in Support of the U.S. Secret Service.

The expert and unanimous views of the agency professionals whom Congress has charged with ensuring the President's protection are entitled to great weight in evaluating the need for the privilege. See *Jaffee*, 518 U.S. at 10-11 & n.9 (recognition of psychotherapist-patient privilege informed by the experience and judgment of the professionals who were trained and practiced in the area). Contrary to the court of appeals' suggestion, the Secret Service Directors' sworn statements are in no way analogous to appellate counsel's unsupported "speculation" in *Swidler & Berlin* v. *United States*, No. 97-1192 (June 25, 1998), slip op. 11. See Pet. App. 8a. The affidavits in this case rest on expert judgment grounded in the personal experience of agency officials charged by Congress with implementing an Act of Congress.

The court of appeals' lack of regard for the Secret Service's professional judgment is contrary to the approach of the courts in other, less weighty privilege contexts. For example, this Court has affirmed the judicial recognition of the *Machin* privilege for the government's military aircraft accident reports, see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802-803 (1984). This Court, and the D.C. Circuit in *Machin* itself, recognized that privilege in response to the professional judgment of federal aviation officials of the need for confidentiality in that context. See 465 U.S. at 796-797 & n.11; *Machin* v. *Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). There is even greater need for according deference to the Secret Service's professional judgment in light of the national security interests at stake. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527-530 (1988); *CIA* v. *Sims*, 471 U.S. 159, 170 (1985); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); *Sherrill* v. *Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977); see also *Stigile* v. *Clinton*, 110 F.3d 801, 806 (D.C. Cir. 1997).

The court of appeals gave no reason for disregarding the Secret Service's views, stating only that it must "balance" the Directors' declarations and President Bush's letter endorsing their views against television interviews of Presidents Carter and Ford in which those former Presidents expressed their opinion that Secret Service personnel should be required to testify in a criminal case. See Pet. App. 8a (citing *Good Morning America* (ABC television broadcast, June 15, 1998); *Hardball with Chris Matthews* (CNBC television broadcast, June 4, 1998)). The court clearly erred in giving weight to those comments, which are not part of the record in this case. Indeed, neither President Carter nor President Ford questioned the Secret Service's considered professional judgment respecting presidential security needs, nor did they question whether some form of protective function privilege existed. Unlike President Bush, neither President Ford nor President Carter addressed the ultimate issue presented in this case, *i.e.*, the impact of compelling testimony on the Service's ongoing relationship of trust and confidence. To the contrary, each supported application of an absolute privilege in civil suits, and President Ford, whose views President Carter endorsed, appeared to support a qualified privilege, based on the court's "judgment as to what is a legitimate area" of inquiry, in criminal cases. See Transcript of *Hard-*

ball with Chris Matthews (CNBC television broadcast, June 4, 1998) (available on Lexis).

The court of appeals compounded its erroneous failure to give appropriate respect to the Secret Service's judgment by substituting its own assessment of the Secret Service's security needs. The court's views of those needs do not rest on professional judgment or any firsthand experience. To the contrary, they are inconsistent with the Directors' sworn affidavits. At bottom, the court's views simply reflect a remote judicial perspective on the relationship between the President and the Secret Service. It thus is the court of appeals' views that may be fairly described as "speculation."

For example, the court suggested that a privilege is unnecessary because "the President has a profound personal interest in being well protected" and "the President knows that effective protection depends upon proximity to his protectors." Pet. App. 8a. History shows, however, that past Presidents have not adequately assessed their security needs. *Id.* at 42a-43a (Merletti Decl. ¶¶ 10-11) (describing the Secret Service's conclusion that the assassinations of Presidents McKinley and Kennedy might have been avoided if those Presidents had permitted their security details to maintain closer proximity). Moreover, when safety depends on unremitting proximity, a slight or seemingly insignificant withdrawal may have fatal consequences. As Director Merletti emphasized, "even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President." Pet. App. 57a (Merletti Decl. ¶ 28).

The court of appeals also suggested that the Secret Service could sufficiently satisfy its security imperatives by educating Presidents about the importance of unremitting proximity. Pet. App. 8a-9a. As Director Merletti explained, however, the educational "process is already exceedingly difficult," and "it would be dramatically compounded if protectees were given reason to be concerned that protective personnel might be called upon to testify about what they were able to see or hear while in such close proximity to their protectees." Pet. App. 51a (Merletti Decl. ¶ 20). See also Dwight L. Tays, *Presidential Reaction to Security: A Longitudinal Study*, 10 Presidential Studies Quarterly 600 (1980) (describing the resistance of various Presidents to Secret Service protection). The court offered no basis to disregard that conclusion of the Secret Service, which alone has encountered the difficulties of protecting resistant Chief Executives and understands firsthand the additional security risks that those difficulties pose.

Finally, the court of appeals additionally questioned the need for the protective function privilege within the White House, suggesting that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. The Secret Service's declarations recount, however, that close proximity is necessary in the White House as elsewhere. See Pet. App. 45a-47a (Merletti Decl. ¶ 15); *id.* at 81a (Bowron Decl. ¶ 7); *id.* at 88a (Magaw Decl. ¶¶ 5-6). For example, in 1994, an individual armed with a semi-automatic weapon opened fire at the White House, and within seconds, Secret Service protective personnel, employing the "cover and evacuate" protocol, were moving the President to safety, even as rounds were still being fired. Pet. App. 57a-58a (Merletti Decl. ¶

28). In another highly publicized example, a pilot intentionally directed a Cessna aircraft at the White House, making contact with the south wall of the Executive Mansion. See *ibid.* In yet another example, a protective officer died while thwarting an attempted assassination of President Truman while he was residing at Blair House. See *id.* at 45a-47a (Merletti Decl. ¶ 15).

b. The court of appeals also committed error in its consideration of the "efficacy" of the protective function privilege. Pet. App. 9a-12a. The court passed over the Secret Service's core submissions without heed to the protective function privilege's basic purpose. The Director of the Secret Service explained that the privilege facilitates Presidential security because it provides the President with reasonable assurance that he may maintain Secret Service agents in close proximity without fear that his personal confidences—including confidences about entirely innocent but private matters—will remain confidential. See Pet. App. 51a-57a (Merletti Decl. ¶¶ 21-25, 27). The court nevertheless rejected the privilege altogether on the basis of peripheral considerations concerning its precise contours and the procedures for its invocation. The considerations that the court of appeals identified do not undermine the President's reasonable expectations or cast doubt that the privilege would fulfill its fundamental objective.

For example, the court found it "anomalous" that the Secret Service did not require its personnel to sign confidentiality agreements as a condition of employment. Pet. App. 9a-10a. As the court had previously recognized, "[t]he Secret Service has a tradition and culture of maintaining the confidences

of its protectees." *Id.* at 4a. There have been instances of unauthorized disclosures, see *id.* at 11a, but the rarity of those instances during a century of Secret Service protection underscores the extent to which Presidents may justifiably rely on the Secret Service's discretion even in the absence of such agreements. See *id.* at 62a-63a (Bush letter). Indeed, it should come as little surprise that, when a government institution expects its officers to step unflinchingly in the path of an assassin's bullet, it need not demand that those officers sign written confidentiality agreements to secure a relationship of trust. See *id.* at 43a-44a, 53a (Merletti Decl. ¶¶ 12, 24).

The court also suggested that the protective function privilege would not give the President adequate assurances of confidentiality because the Service has indicated that it would not extend the privilege to a Secret Service agent's observation of a felony. Pet. App. 9a. That exception for contemporaneously recognized felonies strikes a reasonable accommodation between the agents' protective and law enforcement roles. The exception recognizes that the first responsibility of Secret Service agents assigned to protect the President is to ensure the President's safety, and that in doing so they must concentrate their attention on the contemporaneous activities of the President and those in his immediate vicinity. Those agents exercise law enforcement authority primarily as an adjunct of that responsibility and not, as in the case of traditional law enforcement officers, to engage in general police activities or conduct investigations into possible criminal activity.

More generally, the recognition that the privilege may be subject to exceptions is no reason to deny the privilege in toto. A privilege need not be limitless to

be efficacious. To the contrary, every privilege entails a balancing between the policy underlying the privilege and the "general duty to give what testimony one is capable of giving." *Jaffee*, 518 U.S. at 9 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). As the Court indicated in *Jaffee*, a court may identify a privilege without determining its full scope or precise limitations. *Id.* at 18 ("it is neither necessary nor feasible to delineate [the] full contours [of the privilege] in a way that would 'govern all conceivable future questions in this area'" (citing *Upjohn Co.* v. *United States*, 449 U.S. 383, 386 (1981)).

The court additionally questioned the efficacy of the privilege because the Secretary of the Treasury, rather than the President, asserts it. Pet. App. 10a. The Secretary's role in asserting the privilege, however, simply manifests that Congress has charged the Secretary of the Treasury with the responsibility to supervise the Secret Service to protect the life and safety of the President. 18 U.S.C. 3056(a). The Secretary, acting in his official capacity, is the appropriate officer to invoke the privilege, which protects governmental rather than a personal interests. In that respect, the invocation and assertion of the privilege by the head of the relevant department parallels the procedure followed in asserting the state secrets privilege. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

There is nothing anomalous in the Secretary's invoking the protective function privilege, on behalf of the United States, to protect institutional interests pertaining to the Office of the President, because Congress has by law assigned the Secretary the responsibility for protecting the President. Indeed, it is common for a privilege to be asserted by persons

other than the direct beneficiary of the privilege. For example, an attorney can invoke the attorney-client privilege, even though it exists for the benefit of a client. There is also nothing inefficacious in the expectations that result. The Secretary invokes the privilege in his official capacity to maintain confidentiality critical to the Secret Service's mission of protecting the President, and a President therefore can be confident that the Secretary will invoke the privilege in order to fulfill that mission.

The court also expressed concern that, because an incumbent President retains ultimate control over the assertion of the privilege within the Executive Branch, the prospect that a succeeding President might waive the privilege as to a former President undermines the expectation of confidentiality. Pet. App. 10a-11a. That objection is unfounded. As a theoretical matter, governmental privileges as a rule have always been subject potentially to waiver by successors in office, and that possibility has never been thought to render such privileges ineffective. More fundamentally, however, there is no realistic likelihood of such a waiver of the privilege asserted here. Three Secret Service Directors—supported by nine special agents in charge of protecting the President (see C.A. Amicus Br. in Support of U.S. Secret Service)—have affirmed the need for the protective function privilege, and there has never been an occasion of compelled testimony by Secret Service officers or agents on matters within the privilege. In light of that history, no future President would lightly reject the Secret Service's assessment of the ongoing institutional need to preserve every past President's expectation of confidentiality in order to

ensure a relationship of confidence and trust in the future.

c. The court of appeals also erred in its understanding of the proper judicial role in evaluating claims of privilege. Rule 501 of the Federal Rules of Evidence directs that the scope of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The process that Rule 501 describes contemplates that the courts should recognize and tailor privileges in light of the specific policies at stake. See *Jaffee*, 518 U.S. at 18. Rather than making such an effort to tailor the privilege in response to specific issues it identified (which are largely peripheral to the privilege's core purpose of ensuring trust and confidence), the court rejected the claim of a privilege altogether and instead left the matter to Congress. Pet. App. 14a. That approach misconceives the courts' role under Rule 501, which was written with an understanding "of the difficulty inherent in compiling an exhaustive list of evidentiary privileges." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

The Court's decision in *Weber* provides an instructive example of the judiciary's role in evaluating claims of privilege. In the course of interpreting the Freedom of Information Act, 5 U.S.C. 552, the Court affirmed the existence of the *Machin* privilege, which prevents disclosure of government air crash investigation reports. See *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). The Court noted that the privilege arose from practical needs learned through historical experience, 465 U.S. at 802, and that congressional inaction in the face of

that experience does not provide a basis for failing to recognize the privilege, *id.* at 803 n.25. The Court expressly stated:

> Congressional refusal to codify the *Machin* privilege hardly limits the power of courts to recognize the privilege under Rule 501. Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them.

Id. at 804 n.25. That consideration takes on special significance in the case of the protective function privilege, which rests on the Secret Service's nonpartisan assessment of the fundamental security needs of the Executive Branch.[3]

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[3] Although the court of appeals suggested that the question of privilege should be left to Congress, it also suggested that a congressional predisposition against the privilege could be discerned from outlying legal authority. The court stated that Section 535(b) of Title 28, which directs department and agency heads to inform the Attorney General of information "relating to violations of title 18 involving Government officers and employees," 28 U.S.C. 535(b), "militates against recognition of the proposed privilege." Pet. App. 12a. The court offered that theory as little more than an afterthought, and for good reason. Section 535(b) sheds no meaningful light on the question of what evidentiary privileges may be asserted in litigation. There is no indication in the text or background of Section 535(b) that it was intended to have any effect on the privilege in question here. See, *e.g.*, H.R. Rep. No. 2622, 83d Cong., 2d Sess. 3 (1954) ("All this bill seeks to do is to insure, when necessary, that the Attorney General has the authority, upon the basis of information or complaint, to go into any agency to investigate alleged irregularities on the part of Government officers and employees."). The Attorney General, who is responsible for construing and applying Section 535(b), has concluded that the statutory provision does not prevent

As this Court indicated in *Jaffee*, Rule 501 not only "authorizes the recognition of new privileges on a case-by-case basis," but it also allows courts "to define the details of new privileges in a like manner." 518 U.S. at 18. In this case, the court rejected the Secret Service's formulation of the privilege based on discrete criticisms of that formulation without inquiring whether the privilege could be applied in a way that would answer the court's specific concerns. As the court acknowledged, "the physical safety of the President is a public good of the utmost importance." Pet. App. 7a. The court accordingly should have evaluated whether the "proposed privilege" (*ibid.*) might be further tailored to meet the court's specific—and ultimately quite narrow—objections. Its "all or nothing" approach to the question of privilege disserves the important public interests and statutory policies at stake in this case.

More generally, the court of appeals failed to appreciate that, to the extent that it harbored doubts about the existence or scope of the protective function privilege, those doubts should be resolved in favor of protecting the President from the danger of assassination. The privilege asserted here, like the spousal, attorney-client, and psychotherapist-patient privileges, is "rooted in the imperative need for confidence and trust." *Jaffee*, 518 U.S. at 10 (quoting *Trammel* v. *United States*, 445 U.S. 40, 51 (1980)). Secret Service agents maintain the President's confidences under a code of honor, enforced by distinguished tradition, in the same way that they place the President's life above their own. The courts cannot

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invocation of the protective function privilege, and her interpretation is entitled to deference.

reject the protective function privilege without disbelieving the Secret Service's informed professional judgment that its tradition of confidentiality, which the privilege secures, is essential for the Service to fulfill its protective mission. There is no basis in the record, or in reason and experience, to question the Secret Service's expert judgment on that matter. The stakes are simply too high to conclude that, while the Secret Service has made a strong showing (which is unrebutted on the record of the case), it must make that showing still more "clearly and convincingly" (Pet. App. 6a) to protect national interests of such extraordinary magnitude.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
Attorneys

EDWARD S. KNIGHT
General Counsel
Department of the Treasury

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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

STEPHEN W. PRESTON
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

EDWARD S. KNIGHT
General Counsel
Department of the Treasury
Washington, D.C. 20220

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3069

IN RE: SEALED CASE

Argued June 26, 1998
Decided July 7, 1998

OPINION

Before: WILLIAMS, GINSBURG, and RANDOLPH, Circuit Judges.

PER CURIAM: During depositions conducted by the Office of the Independent Counsel as part of grand jury proceedings, officers of the United States Secret Service refused to answer certain questions on the ground that the information sought was protected from disclosure by a "protective function privilege." When the OIC filed a motion in federal district court to compel their testimony, the Secret Service, through the Attorney General, again asserted a protective function privilege, which by that time had been officially invoked by the Secretary of the Treasury, the cabinet officer who oversees the Secret Service. The district court refused to recognize the protective function privilege and granted the motion to compel.

For the reasons set forth below, we affirm. We note at the outset, however, that the question before the court today is whether Secret Service officers can be compelled to testify before a federal grand jury. We express no opinion about the propriety of asserting a protective function privilege in other legal proceedings.

I. Jurisdiction and Standard of Review

As a general rule, in order to obtain appellate review of a district court's order to testify, a witness must first disobey the order and be held in contempt. *See United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940). When someone other than the witness holds the privilege, however, the holder may appeal if "circumstances make it unlikely that [the witness] would risk a contempt citation in order to allow immediate review of a claim of privilege." *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). We have not hesitated to recognize that such circumstances exist when a witness has sworn under oath that he or she will testify if ordered to do so. *See id.*; *In re Sealed Case*, 737 F.3d 94, 98 (D.C. Cir. 1984). In the absence of such a sworn statement we are properly reluctant to conclude that we have jurisdiction. *Compare In re Sealed Case*, 655 F.2d 1298, 1301 (D.C. Cir. 1981) (denying appeal where outside counsel "shared the company's interest in withholding the contested documents") *with In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 673 n.1 (D.C. Cir. 1979) (allowing appeal where witness "appears to have been unwilling to risk a contempt citation"). Because the witnesses in this case are sworn law enforcement agents, we think it highly unlikely they would disobey a court order to testify. Hence, just as a private company may pursue an immediate appeal in order to prevent an employee from testifying as to matters protected by a privilege that the company wishes to assert, *see In re Sealed Case*, 107 F.3d 46, 48 & n.1 (D.C. Cir. 1997), the Secretary of the Treasury may here pursue an immediate appeal in order to prevent Secret Service officers from testifying as to matters protected by a privilege that he has asserted on behalf of the United States.

Accordingly, we accept jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Because the recognition of a testimonial privilege is a legal issue, our review is *de novo*. *Cf. In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986) ("Although the applicability of a privilege is a factual question, determining the scope of a privilege is a question of law, subject to plenary review").

II. Nature of the Asserted Privilege

As described by the Secret Service, the protective function privilege absolutely protects "information obtained by Secret Service personnel while performing their protective function in physical proximity to the President," except that the privilege "does not apply, in the context of a federal investigation or prosecution, to bar testimony by an officer or agent concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony has been, is being, or will be committed." Brief for Appellant at 4 & 5 n.1.

The privilege is necessary, according to the Secret Service, in order for the Service to carry out its

statutory duty to protect the President. *See* 18 U.S.C. § 3056. That is because the Secret Service uses protective techniques the effectiveness of which depends upon close physical proximity to the President. Indeed, in the opinion of the current Director of the Secret Service, "it is no exaggeration to say that the difference of even a few feet between a President and his protective detail could mean the difference between life or death." Declaration of Lewis C. Merletti ¶ 12. The Secret Service has a tradition and culture of maintaining the confidences of its protectees. The Service is concerned that "if any President of the United States were given reason to doubt the confidentiality of actions or conversations taken in sight or hearing of Secret Service personnel, he would seek to push the protective envelope away, or eliminate some of its components, undermining it to the point where it could no longer be fully effective." Merletti Decl. ¶ 27. In a letter to the Director dated April 15, 1998, former President George Bush succinctly stated the case for recognizing the privilege:

> What's at stake here is the confidence of the President in the discretion of the USSS. If that confidence evaporates the agents, denied proximity, cannot properly protect the President.

III. Analysis

Rule 501 of the Federal Rules of Evidence provides in relevant part as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

In its most recent opinion dealing with the recognition of a new testimonial privilege, the Supreme Court reiterated that Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel* v. *United States*, 445 U.S. 40, 47 (1980)). Still, when evaluating a novel claim of privilege "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving," *id.* (citations omitted); testimonial privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify . . . has a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,'" *Trammel*, 445 U.S. at 50 (quoting *Elkins* v. *United States*, 364 U.S. 206, 234, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) (Frankfurter, J., dissenting)); *see United States* v. *Nixon*, 418 U.S. 683, 710 (1974) (new privileges "are not lightly created nor expansively construed"); *see also Jaffee*, 518 U.S. at 9.

The Supreme Court has put considerable weight upon federal and state precedent when recognizing a privilege. *See Jaffee*, 518 U.S. at 12 ("That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychothera-

pist privilege"). Consequently, the OIC makes much of the lack of relevant federal or state precedent for the protective function privilege. The lack of such precedent is hardly surprising, however, in view of the novelty of the OIC's demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President. Although analogies can be drawn to state Governors and their protectors, the consequences of assassination (and hence the necessity of suitable protection) are so much greater at the presidential level that such analogies offer little guidance. In these circumstances, we do not regard the absence of precedent as weighing heavily against recognition of the privilege. The result is simply that judicial recognition of the privilege depends entirely upon the Secret Service's ability to establish clearly and convincingly both the need for and the efficacy of the proposed privilege. In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to "push away" his protectors in situations where there is some risk to his safety.

The Supreme Court requires that a party seeking judicial recognition of a new evidentiary privilege under Rule 501 demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good. *See, e.g., United States* v. *Gillock*, 445 U.S. 360, 375 (1980) (rejecting as "speculative" policy arguments in favor of proposed state legislative privilege). Even in cases where the proposed privilege is designed in part to protect constitutional rights, the Supreme Court has demanded

that the proponent come forward with a compelling empirical case for the necessity of the privilege. *See Branzburg* v. *Hayes*, 408 U.S. 665, 693-94 & n.32 (1972) ("Estimates of the inhibiting effect of [grand jury] subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative"); *Herbert* v. *Lando*, 441 U.S. 153, 169-70 (1980) (finding policy arguments in favor of First Amendment-based editorial process privilege insufficiently "clear and convincing").

As discussed above, the Secret Service claims that ensuring the physical safety of the President is the transcendent public good that justifies the protective function privilege. For its part the OIC "readily acknowledge[s] the profound public interest in Presidential safety upon which the Secret Service places so much emphasis," Brief of Appellee at 14. We likewise agree that ensuring the physical safety of the President is a public good of the utmost importance. We do not think, however, that the Secret Service has shown with the compelling clarity required by Rule 501 that failure to recognize the proposed privilege will jeopardize the ability of the Secret Service effectively to protect the President. As we have said before,

> [w]hile courts must listen with the utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President, we must also assure ourselves that those conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat.

A Quaker Action Group v. *Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969). Here, the arguments of the Secret

Service, apart from the universally shared understanding that the nation has a profound interest in the security of the President, "are based in large part on speculation—thoughtful speculation, but speculation nonetheless." *Swidler & Berlin* v. *United States*, 1998 WL 333019, at *7 (U.S. June 25, 1998).

The Secret Service has submitted declarations of senior Secret Service agents and the above-quoted letter from President Bush in support of the privilege, but against these we must balance recent statements by Presidents Carter and Ford expressing their opinion that Secret Service personnel should be required to testify in a criminal case. *See Good Morning America*, ABC television broadcast of June 15, 1998 (Carter); *Hardball with Chris Matthews*, CNBC television broadcast of June 4, 1998 (Ford) (transcripts of both available on LEXIS: NEWS library, SCRIPT file).

In addition, although we must acknowledge that the Secret Service has a duty to protect the President, we must also consider that the President has a correlative duty to accept protection. *See* 18 U.S.C. § 3056(a) & (d). Moreover, as the district court observed, the President has a profound personal interest in being well protected, and the President knows that effective protection depends upon proximity to his protectors. According to the Director of the Secret Service, an incoming President generally "does not sufficiently appreciate the risks he is facing"; however, each new President's "initial tendency to resist the close protective envelope in which [the Service] want[s] to place him" is overcome by a "natural educational process" in which the President

learns the importance of proximity. Merletti Decl. ¶ 20.

The ability of the proposed privilege to enhance the Secret Service's protection of the President is further weakened by the precise form of the proposed privilege: An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events—and any misdemeanor, regardless of the circumstances—must remain secret. The proposed exception for contemporaneously recognized felonies strikes a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth. On the one hand, because the President cannot know whether an agent will realize he is witnessing the commission of a felony—which depends in part upon how much the agent knows about prior events—the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same). On the other hand, the exception would prohibit testimony (and thus thwart the search for truth) even in cases where the evidence, viewed in the light of subsequent events, would supply a key element in the proof of a serious crime.

We think it significant that the Secret Service does not require its agents to sign confidentiality agreements as a condition of employment; without such an agreement (or statute or rule), the Secretary of the Treasury would find it difficult by invoking the proposed privilege to prevent a former Secret Service agent from testifying, for at least two reasons. First,

a former agent who is not bound by any agreement or rule will suffer no adverse consequences by cooperating in an investigation of the President; second, the Secretary of the Treasury has no way of knowing when such a cooperative former agent is about to testify. If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seems anomalous that the Service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given.

We also think the efficacy of the privilege is undermined by its being vested in the Secretary of the Treasury and not in the President, whose conduct the proposed privilege is supposed to influence; we know of no other privilege that works that way. If the person whose conduct is to be influenced knows that the privilege might be waived by someone else, the effect of the privilege in shaping his conduct is greatly diminished if not completely eliminated. Accordingly, the assertion of the White House Counsel, in a letter to the OIC, that "the privilege is not [the President's] to assert or to waive" reinforces our impression that the proposed protective function privilege will provide only a weak incentive for the President to keep his protectors in close proximity. Letter from Charles F.C. Ruff to Kenneth W. Starr dated May 11, 1998.

In any event, an incumbent president's ability to control the assertion of the privilege—even indirectly, via the Secretary of the Treasury—would end when the President leaves office. This weakens the claim that the privilage in the form proposed by the Secret Service will do anything to diminish the

President's incentive to keep his protectors at a distance. For just as the "[p]osthumous disclosure of [privileged] communications [between attorney and client] may be as feared as disclosure during the client's lifetime," *Swidler & Berlin*, 1998 U.S. 333019, at *5, so too may disclosures by Secret Service agents after the President leaves office be as feared as disclosures during his incumbency. The privilege in its proposed form does nothing to allay that fear.

We have still other doubts about both the need for and the efficacy of the proposed privilege. As for need, the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings. *See United States Dept. of the Treasury, Public Report of the White House Security Review* 92 (1995), quoted in Brief of *Amici Curiae* William P. Barr *et al.* at 27 n.10 ("Although . . . Presidents have been exposed to deadly or life-threatening assaults with frightening regularity, not one of these assaults has occurred within the White House Complex. Indeed, each assassination or potentially deadly assassination attempt has occurred when the Presidential protectee was away from the White House, in the proximity of a crowd"). We note also that Secret Service agents have given testimony in the past about the functioning of the tape recording system in the Oval Office and that some Secret Service agents have disclosed observations from their protective experiences in books, apparently without causing Presidents to distance themselves from their protectors. As for efficacy, we suspect that even with a protective function privilege in place, conscience

might impel a President to distance himself from Secret Service agents when engaging in wrongful conduct, as might a simple desire for privacy at other times.

Finally, § 535 of the Judicial Code, 28 U.S.C., under which the Independent Counsel exercises the authority of the Attorney General by virtue of 28 U.S.C. § 594(a), militates against recognition of the proposed privilege. Section 535(a) initially authorizes the Attorney General to "investigate any violation of title 18 [the federal criminal code] involving Government officers and employees"; § 594(a) transfers that responsibility to the Independent Counsel by giving him, "with respect to all matters in [his] prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of . . . the Attorney General." The OIC contends that the Independent Counsel stands in the shoes of the Attorney General for purposes of § 535(b)(1) as well. That section provides that any "information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General, unless the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law." Because the Secret Service is an executive branch agency, and because § 594(a) assigns the responsibility for the investigation at issue to the Independent Counsel, the OIC maintains that the statute affirmatively requires Secret Service employees to report any covered information directly to him and hence

leaves no room for the assertion of the claimed privilege. The Secret Service disputes this reading. It argues that the "unless" proviso in that section eliminates the reporting requirement once the Attorney General is out of the picture and that, even if it does not, the proposed protective function privilege carves out an exception to the general rule of the statute. We need not resolve this dispute. Whatever the answer, it is apparent that § 535(b) evinces a strong congressional policy that executive branch employees must report information "relating to violations of title 18 involving Government officers and employees." That policy weighs against judicial recognition of the privilege proposed here.

Recalling the Supreme Court's caution that privileges "are not lightly created nor expansively construed," *Nixon* 418 U.S. at 710, we are constrained not to recognize any new privilege the need for which is less than "clear and convincing." *Herbert* v. *Lando*, 441 U.S. at 170. Here the need is fairly disputed, and "[i]n an area where empirical information would be useful, it is scant and inconclusive." *Swidler & Berlin*, 1998 WL 333019, at *7. In these circumstances we cannot say that the proposed protective function prvilege clearly "promotes sufficiently important interests to outweigh the need for probative evidence" in a criminal investigation. *Jaffee*, 518 U.S. at 9-10 (quoting *Trammel*, 415 U.S. at 51).

IV. Conclusion

The Secret Service has failed to carry its heavy burden under Rule 501 of establishing the need for the protective function priviege it sought to assert in this case. Consequently, we leave to the Congress the question whether a protective function privilege is appropriate in order to ensure the safety of the President and, if so, what the contours of that privilege should be. The order of the district court is therefore affirmed.

In accordance with the Supreme Court's expectation that "the Court of Appeals will proceed expeditiously to decide this case," *United States* v. *Clinton*, 1998 WL 286739, at *1 (June 4, 1998), any petition for rehearing or suggestion for rehearing in banc shall be files within 7 days after the date of this decision.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)

IN RE GRAND JURY PROCEEDINGS

REDACTED VERSION

MAY 22, 1998

I. Background

Pending before the Court is the motion of the Office of Independent Counsel ("OIC") to compel the testimony of [REDACTED]. These witnesses have refused to answer questions before a grand jury about [REDACTED] [FOOTNOTE REDACTED]. Each witness asserted the "protective function privilege" [REDACTED] [FOOTNOTE REDACTED]. None of the questions at issue relate to the protective techniques or procedures of the Secret Service.

The Secret Service wants this Court to recognize a new "protective function privilege" as a basis for withholding testimony before a federal grand jury. Because this privilege is a novel one, the Secret Service has suggested to the Court what it contends to be the scope of the privilege. The Service characterizes its proposed privilege as an absolute privilege that would preclude the OIC from compelling any

testimony regarding information learned by Secret Service agents and officers while performing protective functions in physical proximity to the President where the information would tend to reveal the President's contemporaneous activities. According to the Secret Service, this privilege would encompass the agents or officers' observations of conduct and of individuals' identities as well as statements that they overheard.

In addition, the Secret Service suggests certain exceptions to its proposed privilege. The protective function privilege would not include observations made or statements overheard by an officer or agent who is not performing a protective function. There would also be an exception allowing testimony for observed actions or overheard statements that were, at the time of their perception, "sufficient to provide reasonable grounds to conclude that a felony has been, is being, or will be committed." Opp. to the Mot. to Compel at 2. Finally, the Secret Service declares that compelling circumstances, such as national security concerns, might overcome the privilege, but asserts that such circumstances do not exist here.

II. The Protective Function Privilege

The Secret Service asks the Court to recognize a new protective function privilege pursuant to Federal Rule of Evidence 501. Rule 501 provides that evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience." The Supreme Court has interpreted Rule 501 to require courts to consider: 1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests. *See, e.g., Jaffee* v. *Redmond*, 518 U.S. 1, 12-15 (1996); *University of Pennsylvania* v. *E.E.O.C.*, 493 U.S. 182, 189 (1990); *Trammel* v. *United States*, 445 U.S. 40 (1980); *United States* v. *Gillock*, 445 U.S. 360 (1980). With respect to public policy interests, courts should consider whether the new privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee*, 518 U.S. at 9-10.

Although Rule 501 gives courts the authority to recognize new privileges, the Court begins by noting that privileges "are not lightly created nor expansively construed." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Indeed, the Supreme Court has recognized only one new evidentiary privilege and has rejected several attempts to create new privileges. *See Jaffee*, 518 U.S. at 15 (recognizing a patient-psychotherapist privilege); *University of Pennsylvania*, 493 U.S. at 195 (rejecting a university privilege for tenure review files); *Trammel*, 445 U.S. at 53 (rejecting extension of the marital communications privilege to voluntary testimony); *Gillock*, 445 U.S. at 373 (rejecting a state legislator privilege); *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting a work product privilege for accountants); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (rejecting editorial process privilege for the press); *Couch* v. *United States*, 409 U.S. 322 (1973) (rejecting an accountant-client privilege). The Supreme Court was willing to recognize a new privilege only when the privilege had some history in federal law and enjoyed broad state support, and public policy considerations weighed strongly in favor of recognizing it.

A. Federal History

The Court has found no federal history of a protective function privilege and counsel for the Secret Service conceded during oral argument that no court has ever recognized the privilege. Motion Hearing in Misc. No. 98-148, May 14, 1998, Tr. at 20. The Court finds no constitutional basis for recognizing a protective function privilege.[1] In addition, there is no history of the privilege in federal common or statutory law. Only two statutes are even relevant to the asserted protective function privilege. *See* 18 U.S.C. § 3056(a); 28 U.S.C. § 535(b). Section 3056(a) compels the President and Vice President to accept the protection of the Secret Service but says nothing about an evidentiary privilege. In mandating that the Secret Service be near the President at all times, Congress must have realized that Secret Service members would inevitably witness the President's conduct and hear his communications. Nevertheless, Congress did not create a protective function privilege.

By contrast, under section 535(b), Congress imposed a duty on all executive branch personnel to report criminal activity by government officers and employees to the Attorney General. According to Section 535(b), the duty to report criminal activity applies "*unless* . . . as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint." 28 U.S.C. § 535(b)(2) (emphasis added). Secret Service employees are not

[1] The Secret Service has not asserted a constitutional basis for the claimed privilege. Tr. at 4.

only executive branch personnel subject to Section 535(b), but they are also law enforcement officers. Despite this, the Secret Service contends that Section 535(b) does not conflict with the asserted protective function privilege because the Attorney General supports this privilege for a specified class of information. The OIC argues that Section 535(b) prohibits this Court from recognizing such a privilege because to do so would override the will of Congress.[2] Although the Court does not find that section 535(b) prohibits recognition of the privilege given the exception incorporated into the statute, the Court does find that a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials. In short, sections 535(b) and 3056(a) suggest that Congress did not intend for there to be a protective function privilege and the Supreme Court has found the intent of Congress to be a significant factor in rejecting new privileges. *See University of Pennsylvania*, 493 U.S. at 189; *Arthur Young*, 465 U.S. at 816. If Congress now believes such a privilege is warranted, it, unlike this Court, is free to create one.

The fact that the protective function privilege enjoys no support in federal law makes it distinguishable from the patient-psychotherapist privilege recognized in *Jaffee*. The Secret Service relies heavily on *Jaffee* as support for recognizing a new protective

[2] The OIC argues that Article III courts cannot create federal common law if Congress has already spoken on the subject, citing *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981) and *District of Columbia* v. *Air Florida*, 750 F.2d 1077, 1085 (D.C. Cir. 1984).

function privilege; however, unlike the protective function privilege, the patient-psychotherapist privilege had some federal history. A few U.S. courts of appeals had recognized a patient-psychotherapist privilege and the privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules. *See Jaffe*, 518 U.S. at 7, 9 n.7, 14. The Supreme Court's holding in *Gillock* that 'Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft." *Jaffee*, 518 U.S. at 14-15 (citing *Gillock*, 445 U.S. at 367-68). As the Supreme Court explained, the absence of a state legislative privilege in the proposed rules 'suggest[ed] that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *Gillock*, 445 U.S. at 367-68. Thus, according to *Jaffee* and *Gillock*, the fact that the protective function privilege is not among the nine recommended privileges provides further support for not creating one. Even in *Trammel*, a case in which the asserted spousal privilege had "ancient roots" and was included among the nine proposed privilege rules, the Supreme Court refused to apply the spousal privilege to voluntary testimony. 445 U.S. at 43, 47.

Although the protective function privilege has no history in federal law, there is some history of Secret Service agents testifying in judicial and non- judicial proceedings with respect to President Nixon's taping system and John Hinckley's attempted assassination of President Reagan. In those two instances, the Secret Service did not assert a protective function privilege. In fact, the Secret Service has never

claimed an evidentiary privilege prior to this time. The Secret Service claims this is because no prosecutor has ever compelled testimony from Secret Service agents before. Tr. at 20. While this may be so, the fact remains that Secret Service agents have been willing to testify in the past and have never before felt the need to assert a privilege. The Court finds that the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege.

B. State History

No state has ever recognized a protective function privilege or its equivalent. The absence of any state support for the privilege not only militates against recognizing one, but also distinguishes it significantly from the patient-psychotherapist privilege recognized in *Jaffe*. One of the Supreme Court's primary reasons for recognizing the patient- psychotherapist privilege was the fact that all 50 states and the District of Columbia already recognized such a privilege. *See Jaffe*, 518 U.S. at 12. As the Supreme Court explained: 'the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege. *Id.* at 13. Likewise, the lack of any state support for the protective function privilege indicates that "reason and experience" do not warrant recognizing it. This conclusion is supported by the Supreme Court's refusal to recognize a confidential accountant-client privilege in part because "no state-created privilege has been recognized in federal cases." *Couch*, 409 U.S. at 335. The fact that every state has a governor in need of

protection and that no state has ever recognized a protective function privilege provides a compelling reason for not creating the new privilege.

C. Public Policy Considerations

Because the proposed privilege lacks any historical basis, the Secret Service vigorously asserts public policy considerations in support of the protective function privilege. The Secret Service surrounds the President with a zone of protection at all times and declares that the success of this protection relies on complete and unquestioned proximity to the President. If an agent were compelled to testify about observations made while protecting the President, the Secret Service claims that current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive. In support of their assertions, the Secret Service presented the affidavits of the current Director of the Secret Service, Lewis Merletti, and two former Directors, John Magaw and Eljay Bowron, as well as a letter from President Bush. The Secret Service did not present any letter or declaration from President Clinton.

The physical safety of the President of the United States is clearly of paramount national importance. The Court is in absolute agreement with the Department of Justice that presidential assassinations are horrible tragedies, devastating for the country both emotionally and politically. While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to

testify before a grand jury regarding evidence of a crime would place Presidents in peril.[3]

The Court does not doubt that physical proximity between Secret Service personnel and the President is crucial to the President's safety. However, it does not accept the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to "push away" his protectors. When people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury. It is not at all clear that a President would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts. Such actions are extremely unlikely to become the subject of a grand jury investigation. The claim of the Secret Service that "any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation," Opp. to the Mot. to Compel at 28, is simply not plausible.

The Court notes that Secret Service agents have written books about their protective experiences and given extensive information to authors who have written tell-all books. See *e.g.*, *Seymour Hersh, The Dark Side of Camelot* (1997) (describing four agents' revealing observations of President Kennedy). There is no indication that those published accounts have

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[3] Even if a President might distance himself on occasion from the Secret Service out of concern that its agents or officers might testify against him, the Court simply has no legal basis for recognizing the protective function privilege. As explained above, there is no legal support for creating this new privilege.

caused Presidents to push Secret Service agents away because information about their private lives might become public.

The Court is not ultimately persuaded that a President would put his life at risk for fear that a Secret Service agent might be called to testify before a grand jury about observed conduct or overheard statements. The President has a very strong interest in protecting his own physical safety. Secret Service Director Merletti states that each incoming President initially resists the intense protection provided by the Secret Service. Merletti Decl. at ¶ 20. Agents do, however, successfully demonstrate to the President that proximity is essential. *Id.* The Court has great confidence in the ability of the Secret Service to continue its education and inform its protectees of the vital importance of close proximity, just as this Court has been informed.

Finally, the Secret Service is composed of public employees who are law enforcement officers. The Secret Service's law enforcement obligation and its duty to report criminal activity under 28 U.S.C. § 535(b) provide persuasive policy reasons in favor of compelling grand jury testimony.

In the end, the policy arguments advanced by the Secret Service are not strong enough to overcome the grand jury's substantial interest in obtaining evidence of crimes or to cause this Court to create a new testimonial privilege. Given this and the absence of legal support for the asserted privilege, this Court will not establish a protective function privilege.

D. Who Must Assert the Privilege

While the Court declines to recognize a protective function privilege, it must note that even if so inclined, the privilege has not been properly invoked. The President has not himself invoked the protective function privilege nor has he instructed the witnesses to invoke it. Instead, Robert Rubin, the Secretary of the Department of the Treasury, has formally asserted the privilege. Rubin Decl. at ¶ 4. The Director of the Secret Service states that he has not consulted with the President or the White House on this issue. Merletti Decl. at ¶ 2. The OIC has requested that the President personally waive this privilege, Reply Mem. in Support of Mot. to Compel at Exh. B, but there is no known response.

Because there is no law on the protective function privilege, the issue of who must assert the privilege is not settled. The Secret Service argues that the policy reasons behind the proposed protective function privilege parallel those behind the state secrets privilege. Because the head of an agency must assert the state secrets privilege, *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953), the Secret Service contends that the Secretary of the Department of the Treasury is the appropriate person to assert this privilege. However, no state secrets are involved in this matter. The proposed privilege more closely resembles the attorney-client privilege. The theory of the Secret Service is that, if the agency protected the confidentiality of presidential activities, the President would not hide any of his private actions from his protectors. The President's confidences are theoretically at issue under the protective function privilege, just as the client's confidences are at issue

under the attorney-client privilege. For these reasons, there is a question as to whether the alleged privilege has been properly presented.

III. Conclusion

For the reasons given above, this Court will grant the motion of the Office of Independent Counsel to compel [REDACTED] to testify regarding the matters for which they asserted the putative protective function privilege. An appropriate Order will follow.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)
IN RE GRAND JURY PROCEEDINGS

REDACTED VERSION

[May 22, 1998]

ORDER

Pending before the Court is the motion of the Office of Independent Counsel ("OIC") to compel the testimony of [REDACTED]. These witnesses have refused to answer questions before a grand jury, asserting the protective function privilege. [REDACTED]. Upon consideration of the OIC's motion to compel, the opposing and supporting memoranda, and the oral argument of counsel, it is this 22nd day of May 1998,

ORDERED that the motion be, and hereby is, granted with respect to the questions to which the [REDACTED] witnesses asserted the protective function privilege; and it is further

ORDERED that [REDACTED].

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 98-3069
Misc. No. 98-148

IN RE: SEALED CASE

[Filed: July 16, 1998]

ORDER

Before: WILLIAMS, GINSBURG, RANDOLPH,
Circuit Judges

Upon consideration of appellant's petition for rehearing filed July 14, 1988, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 98-3069
Misc. No. 98-148

IN RE: SEALED CASE

[Filed: July 16, 1998]

ORDER

Before: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

A Statement of Circuit Judge Silberman concurring in the denial of rehearing *in banc* is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

SILBERMAN, *Circuit Judge*, concurring in the denial of rehearing *en banc*: This is the first time in 13 years on this Court that I have seen a petition for rehearing or an appellant's brief that does not state the identity of the party petitioning or appealing in the caption of the brief. There is a good reason. It is now established beyond dispute that the Independent Counsel stands in place of the Attorney General and represents the United States in any proceeding within his or her jurisdiction. *See* 28 U.S.C. § 594(a) (1994) (providing that the Independent Counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General"). The Independent Counsel's briefs therefore are captioned as the briefs of the United States. The Attorney General apparently all too aware of this problem, filed a petition without identifying, in it caption, the party she is representing. Yet on the first page of the brief she purports to represent the United States. That is analytically impossible. We cannot have two opposing lawyers before us representing the same named party. *See United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 430 (1949) (recognizing general principle that "no person may sue himself"); *see also United States* v. *Providence Journal Co.*, 495 U.S. 693, 706 (1988) (finding startling the proposition that "there is more than one 'United States' that may appear before this Court").

Nor is this simply a matter of captioning. Even if under certain circumstances it can be thought that two entities of the executive branch can litigate against themselves under Article III, *see United States* v. *Nixon*, 418 U.S. 683, 694-97 (1974) (holding

justiciable a suit between the special prosecutor and the President); *United States* v. *ICC*, 337 U.S. at 432 (permitting suit between ICC and Attorney General either on the grounds that private railroads were the real parties in interest or that the ICC is an independent agency), the Attorney General lacks prudential standing under the Ethics in Government Act. That Act provides that the Independent Counsel replaces the Attorney General with respect to all matters within the Independent Counsel's prosecutorial jurisdiction. *See* 28 U.S.C. § 594(a). Indeed, the Act specifically mandates that the Department of Justice and the Attorney General "suspend all investigations and proceedings regarding" the subject matter of the Independent Counsel's investigation. *See* 28 U.S.C. 597(a). Unless the Independent Counsel agrees in writing to permit the Department of Justice to continue its involvement in the case, *see id.*,[1] the Attorney General is permitted to file only an *amicus brief* in such a proceeding. *See* 28 U.S.C. 597(b). An *amicus brief*, of course, would be inadequate here

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[1] As we have said before, the "principal aim of [section 507(a)] is to 'prevent[ ] investigations by the Department of Justice which would duplicate and possibly impede the work of Independent Counsel." *United States* v. *Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994) (quoting *In Re: Sealed Case*, 829 F.2d 50, 56 (D.C. Cir. 1987)). Accordingly, courts have previously rejected the Attorney General's attempts to appeal decisions that an Independent Counsel chose not to pursue. *See, e.g.*, *United States* v. *North*, 713 F. Supp. 1441, 1441 (D.D.C. 1989) (remarking that the Attorney General's attempt to appeal was "frivolous and at odds with the purposes of the laws establishing the Independent Counsel"); *see also United States* v. *Fernandez*, 877 F.2d 465, 469 (4th Cir. 1989) (holding the Congress intended the special prosecutor to "exercise the power to appeal with independence from the Department of Justice").

because if the Attorney General is not permitted to "represent" the United States (the Treasury Department) neither is any other government lawyer. It seems clear to me then that no one in the United States Government, speaking for the government, has standing to oppose the Independent Counsel in this proceeding, and, therefore, neither we nor the district court have jurisdiction over this case.

That, as should be apparent, means that it is up to the Independent Counsel—the surrogate Attorney General in this matter—to decide whether the "privilege" asserted by the Secret Service as a government entity should be recognized. It might be thought that it is somewhat anomalous to permit an Independent Counsel to decide on his or her own whether the Secret Service should be compelled to testify before a grand jury investigating the President of the United States. But the Ethics in Government Act contemplates that an Independent Counsel—performing the role of Attorney General—would determine the appropriate balance between national security and law enforcement interests in a particular case. *See* § 594(a)(6). Indeed, that was one of the very reasons this court, *see In Re: Sealed Case*, 838 F.2d 476, 503 (D.C. Cir. 1988), and later Justice Scalia in dissent, *see Morrison* v. *Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting), thought the statute unconstitutional. But the Supreme Court majority brushed those concerns aside. So Congress and the Supreme Court have crossed that bridge.

Of course the President is entitled to personal representation against the Independent Counsel and it would be open to him to assert any personal privilege, but is seems even more farfetched than is

the present claim to conclude that he would have a *personal* protection privilege-which I suppose is why the case is postured as it is. But the notion, about which the panel was dubious, that the newly minted Secret Service Protection Privilege is being asserted by the Treasury Department, independent of the President, seems to me to be a constitutional absurdity.[2] The Attorney General is, in effect, acting as the President's counsel under the false guise of representing the United States, contrary to the whole purpose and structure of the Ethics in Government Act. I am mindful of the terrible political pressures and strains of conscience that bear upon senior political appointees of the Justice Department when an Independent Counsel (or special prosecutor) is investigating the President of the United States. Those strains are surely exacerbated when the President's agents literally and figuratively "declare war" on the Independent Counsel (can it be said that the President of the United States has declared was on the United States?). The Act, however, limits the options that the Attorney General can legally (and honorably) purse. Litigating against the Independent Counsel in this case is not among them. *See United States* v. *Wilson*, 26 F.3d 142, 150 (D.C. Cir. 1994) (stating that "the principal aim of the independent counsel provisions is to guard the court-appointed prosecutor from undue influence by the Administra-

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[2] *See In Re: Sealed Case*, 1998 WL 370584, at *6 (D.C. Cir. 1998). That the supposed privilege furthers the interest of the Secret Service is not a reason to conclude that if such a privilege were recognized it would belong to the Secret Service, not the President. After all, the attorney-client privilege very much serves lawyers' interest, but is can only be asserted by the client.

tion in general *and the DOJ in particular*") (emphasis added); *see also* S. Rep. No. 170, 95th Cong., 2d Sess. 66 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4216, 4282 ("The whole purpose of [the Act] is defeated if a special prosecutor is not independent and does not have clear authority to conduct a criminal investigation and prosecution without interference, supervision, or control by the Department of Justice").[3] Although I think the panel opinion is substantively correct, I would dismiss the case as outside our jurisdiction.

[3] Quite contrary to the actions of the Justice Department in this case, the Act specifically mandates that the Justice Department provides assistance to the Independent Counsel. *See* 28 U.S.C. § 594(d)(1).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

98-3069
Misc. No. 98-148
IN RE: SEALED CASE

[Filed: July 16, 1998]

ORDER

Before: WILLIAMS, GINSBURG, RANDOLPH,
Circuit Judges

Upon consideration of the emergency motion for a stay and an order under the All Writs Act pending disposition of the petition for rehearing in banc, and the opposition thereto, it is

ORDERED that the request of the Department of Justice for a stay pending the filing, and eventual disposition of a petition for a writ of certiorari in the Supreme Court be denied. The motion of the Department of Justice for an order, under the All Writs Act, 28 U.S.C. § 1651(a), postponing the testimony of seven Secret Service officers before the grand jury is denied. The administrative stay issued on July 16, 1998, is continued until 12 noon July 17, 1998, to give the Department of Justice an opportunity to seek relief from the Supreme Court.

The Department of Justice has not made a sufficient showing that irreparable harm will result

unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges. See D.C. Cir. R. 8(a)(1). The privilege is said to be necessary because, without it, the President will distance himself from Secret Service agents charged with the duty of protecting him. See *In re Sealed Case*, No. 98-3069 (D.C. Cir. July 7, 1998). The harm asserted is future harm, depending on a prediction about what the President will do in the absence of the privilege. This court has ruled that the privilege does not exist; no judge on the court has even requested a vote on the Justice Department's suggestion for rehearing *en banc*. If harm of the sort the Department envision is now occurring, it therefore must be because the President does not believe the Supreme Court will sustain the privilege. Neither a stay nor an order under the All Writs Act can alter or prevent that alleged harm. Testimony today by Secret Service agents regarding past events cannot charge our ruling. And such testimony cannot affect how the Supreme Court will rule. We also believe, for the reasons stated in our opinion of July 7, 1998, that the Justice Department's likelihood of success before the Supreme Court is insufficient to warrant further delay in the grand jury's investigation.

Per Curiam

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)

IN RE GRAND JURY SUBPOENA

FILED UNDER SEAL

DECLARATION OF LEWIS C. MERLETTI
DIRECTOR, UNITED STATES SECRET SERVICE

[April 21, 1998]

Introduction

1. I, Lewis C. Merletti, serve as the Director of the United States Secret Service (the "Secret Service"), an executive branch, law enforcement bureau of the Department of the Treasury. As Director of the Secret Service, it is my ultimate responsibility to protect the life and safety of the President of the United States.

2. I submit this declaration in support of the Opposition of the United States to the Independent Counsel's Motion to Compel the testimony of two United States Secret Service Uniformed Division Officers regarding what they and other Secret Ser-

vice personnel might have witnessed while they were protecting the President, as well as to compel the testimony of [REDACTED] regarding information he may have obtained from these two officers. In response to the Independent Counsel's motion, I hereby state for the record that I have not been directed by the President of the United States or anyone at the White House regarding this opposition to the Motion to Compel or even regarding the general issue of the protective function privilege. Nor have I consulted with the President or the White House regarding this issue. Rather, it is my firm belief, as Director of the United States Secret Service, that using Secret Service protective personnel as witnesses concerning the activities of a President will substantially undermine, if not destroy, the relationship of confidence and trust that must exist between the Secret Service and a President for the Secret Service to successfully fulfil its mission. If our Presidents do not have complete trust in the Secret Service personnel who protect them, they may push away the Service's "protective envelope," thereby making them more vulnerable to assassination. Because I believe that the Independent Counsel's Motion to Compel represents a threat to the safety of this and future Presidents, I respectfully request an opportunity to be heard in person on this subject, so I can describe the imperative need for a protectee to have a relationship of complete and absolute trust with Secret Service personnel performing their protective function. Moreover, there are certain details that I believe are relevant to the Court's analysis that, while not easily and appropriately included in a written submission, can be presented in an oral, sealed presentation to the Court.

Background

3. I was appointed Director of the Secret Service on June 6, 1997. Before joining the Secret Service, I served three years in the United States Army, including a one-year tour of duty with the 5th Special Forces Group in Vietnam. Since leaving the Army, I have served as a career Secret Service Special Agent for more than 23 years. My appointment as the 19th Director of the Secret Service continued the long-standing tradition that the lead executive of our agency is selected from within the ranks of our career special agents. I was appointed to the Service on November 25, 1974, and have had the honor of serving for Presidents Gerald Ford, Jimmy Carter, Ronald Reagan, George Bush, and Bill Clinton. During the course of my career, I have held numerous operational and supervisory positions in the Secret Service. Within the Secret Service, the units with primary responsibility for protecting the life of a President are the Presidential Protective Division ("PPD") and the Secret Service Uniformed Division ("Uniformed Division" or "UD"). I have been assigned to the Presidential Protective Division under Presidents Reagan, Bush, and Clinton.

4. I first worked as a PPD Special Agent from February 19, 1984 through December 6, 1986. I was promoted to the Assistant Special Agent in Charge on January 7, 1988, and served in that capacity through March 23, 1991. I served as Deputy Special Agent in Charge from March 20, 1994 until my appointment on September 3, 1995 as the Special Agent in Charge ("SAIC") for the Presidential Protective Division. I served as the Special Agent in Charge for the Presidential Protective Division during the period

September 1995 through February 1997. For the period from February 1997 through June 1997, just prior to being appointed Director of the Secret Service, I was the Assistant Director in charge of all Secret Service training functions.

5. In my current capacity as Director, I am responsible for supervising all aspects of the Secret Service's mission, including the agency's protective, as well as criminal investigative, functions. As Director, I oversee all administrative and operational components of the Secret Service, and I am accountable for the successful completion of all of the Service's functions. Moreover, in light of my more than two decades of experience at the Secret Service—including most prominently my experience serving on the Presidential Protective Division in close proximity to Presidents Reagan, Bush, and Clinton—I can describe first-hand the protective operations of the Secret Service, the truly extraordinary relationship of trust and confidentiality that must exist between the Service and the Service's statutory protectees, and the grave, and, in my view, unacceptable, risk that would ensue if this relationship of trust and confidentiality were to be compromised.

6. It is my belief that an explanation of the history of the Secret Service, its statutory responsibilities and structure, and the relationship that must exist between the Secret Service and its protectees, will assist the Court in assessing whether to grant the Independent Counsel's Motion to Compel.

History of the Secret Service's Protective Philosophy

7. Unlike many foreign protective agencies, the Secret Service has developed a protective envelope philosophy emphasizing a "cover and evacuate," as opposed to a "counter-offensive," method of protection. Under the cover and evacuate method, agents and officers surround each protectee with an all-encompassing zone of protection on a twenty-four hour a day, 365-day a year basis. As I will explain below, our protective philosophy relies on complete and unquestioned access and proximity to our protectees, particularly the President. The Secret Service has developed its protective envelope method of protection from bitter historical experience.

8. The assassination of the President of the United States is, quite literally, a cataclysmic event in world history. It is also, of course, the worst possible incident that can occur on the Secret Service's watch. For this reason, it is the practice of the Secret Service to review and assess all assassination attempts, wherever and whenever they occur. Indeed, in an effort to stress the critical importance of our protective envelope theory of protection, we teach our protective personnel about America's historical experience with assassinations and assassination attempts.

9. The Secret Service was created on July 5, 1865, as the first general law enforcement agency within the federal government. During the period from the end of the Civil War through 1901, three presidents were assassinated: President Abraham Lincoln on April 14, 1865, President James A. Garfield on July 2,

1881, and President William McKinley on September 6, 1901. In retrospect, the assassination of President McKinley has served as a watershed moment in the history of the Secret Service and demonstrates the overwhelming need for the Service to maintain close proximity to the President at all times.

10. On September 6, 1901, President McKinley attended the Pan-American Exposition. As we understand from historical records, a receiving line was set up for members of the public to greet the President. By prior arrangement, a Secret Service agent was to stand directly by the President's side as he greeted the public. At the request of the president of the Pan-American Exposition, who wished to be standing next to the President, the Secret Service agent was moved away from President McKinley's side. According to our understanding, it was only a matter of minutes before President McKinley was shot at point-blank range. Given the nature of this assassination—with the assailant approaching the President with his hand wrapped rather obviously in a handkerchief in an attempt to hide his gun—there is a substantial likelihood that an agent or officer within close proximity of the President would have averted the assassination. This was the first, but unfortunately not the last, example of an assassination occurring after the Secret Service was moved away from a protectee.

11. I have attached, as Exhibit A to this Declaration, photographs of President John F. Kennedy's visit to Tampa, Florida on November 18, 1963. We use these photographs, and the ones attached as Exhibit B, in our training exercises. Exhibit A demonstrates the lengths to which protective personnel have been forced to go to try to maintain proximity to the

President. In the photographs contained in Exhibit A, agents are kneeling on the running board of the Presidential limousine while the vehicle was traveling at a high rate of speed. I can attest that this requires extraordinary physical exertion. Nevertheless, they performed this duty in an attempt to maintain close physical proximity to the President. Exhibit B, by contrast, scarcely needs any introduction. It is a series of photographs of the Presidential limousine, taken just four days later, on November 22, 1963, in Dallas, Texas. As can be seen, at the instruction of the President, Secret Service agents had been ordered off of the limousine's running boards. An analysis of the ensuing assassination (including the trajectory of the bullets which struck the President) indicates that it might have been thwarted had agents been stationed on the car's running boards. In other words, had they been able to maintain close proximity to the President during the motorcade, the assassination of John F. Kennedy might have been averted. Exhibit C contains a series of photographs taken during the actual assassination that demonstrate how critical and tragic the absence of proximity to the protectee can be.

12. One need only contrast the successful assassinations of Presidents McKinley and Kennedy with the unsuccessful assassination attempt on President Reagan to understand that unfettered close proximity to the President can, quite literally, mean the difference between life and death. As Exhibit D demonstrates, the Secret Service's protective envelope was in place on March 30, 1981, when John Hinckley attempted to assassinate President Reagan. As our analysis of the assassination attempt demonstrates,

the assassination was prevented because the Secret Service was in close proximity to the President and immediately shielded the President's body and pushed him into the awaiting limousine. One agent in particular, Agent Tim McCarthy, acted as a human shield, positioning his body to intercept a bullet intended for the President. At the same time, Special Agent In Charge Jerry Parr, positioned immediately behind the President, literally maneuvered President Reagan from a standing position into the backseat of the Presidential limousine. Immediately thereafter, SAIC Parr covered the President's body with his own, as the limousine sped away. As this episode demonstrates, close proximity to the protectee is an absolute necessity if the Secret Service is to succeed in protecting the life and physical security of a President. Indeed, it is no exaggeration to say that the difference of even a few feet between a President and his protective detail could mean the difference between life or death.

13. As I will be able to explain more fully if I am given the opportunity to personally address the Court, the Secret Service's method of protection contrasts dramatically with philosophies shared by other protective agencies throughout the world. Some of those agencies place great emphasis on the aggressive "overwhelm the attacker" or "counter-attack" method, and less emphasis than the Secret Service on maintaining close proximity to the protectee. Again, if given the opportunity to address the Court, I will provide graphic examples of world leaders who have been assassinated by people who have managed to get in close proximity to them. I provide these examples to stress my basis for believing that maintaining

close and unfettered access to our protectees is of the utmost importance to the national security of the United States.

Statutory Responsibilities and Structure

14. The Secret Service's responsibility to protect the life of a President is codified in federal statute. Pursuant to title 18, United States Code, section 3056 (18 U.S.C. § 3056), the Secret Service is mandated by law to protect this nation's highest constitutional officers, including the President and Vice President and, when applicable, the President-elect, and the Vice President-elect. By the express language of 18 U.S.C. § 3056(a), these individuals may not decline the statutory protection mandated by Congress. The Secret Service is also charged with the protection of the immediate families of the President and Vice President, former Presidents and their families, and the major Presidential and Vice Presidential candidates and, within 120 days of a Presidential election, their spouses. Likewise, pursuant to 18 U.S.C. § 3056, the Secret Service is responsible for protecting visiting heads of foreign states or governments, other distinguished visitors to the United States, and official representatives of the United States performing special missions abroad.

15. The protection of a President and the First Family necessarily involves ensuring that the White House Complex is at all times completely secure. Pursuant to title 3, United States Code, section 202 (3 U.S.C. § 202), the United States Secret Service Uniformed Division is charged with protecting the President and the White House Complex. Uniformed Division officers form an integral part of a President's protective envelope as he moves both within the White

House Complex, and in protective movements outside the White House Complex. Indeed, UD officers do not always work in uniform and, as a result, may appear to be indistinguishable from other protective personnel. Among other things, officers of the Uniformed Division secure the protective perimeter and interior of the White House Complex, operate specialized protective function units such as the Counter Sniper unit and the Emergency Response Team, and play an integral role in contingency plans to clear routes required for the immediate relocation of a President in case of an emergency or attack upon the White House Complex. In addition, UD officers travel with a President to provide protective support. In short, PPD agents and Uniformed Division officers combine to form a moving protective perimeter surrounding a President at all times. I have previously alluded to the extraordinary lengths to which the Secret Service will go to maintain this proximity to a President. Indeed, agents will even wear disguises so that they can unobtrusively stand next to, or near, a President. As Exhibit E 1 through 3 demonstrate, agents have dressed as major league umpires, soldiers, engineers, academics, and priests, in an effort to achieve seamless proximity to a protectee regardless of the context. Moreover, as Exhibit E 4 through 7 reflect, Uniformed Division Officers, both in uniform and in business attire, similarly conduct their duties proximate to the President's person. In fact, as these photos reflect, at times Uniformed Division Officers are positioned most proximate to the President. As a result, wherever a President is located, the Presidential Protective Division and Uniformed Division must be prepared to instantaneously react to protect him in case of attack. This applies with equal force within

the White House, where personnel must be able to provide cover for and perhaps relocate a President within seconds of any threatening event within the White House Complex. As history has demonstrated, there have been attempts to encroach upon the White House Complex both by air and by land. Indeed, in 1950, Leslie Coffelt, a member of the White House Police (the predecessor to the current Uniformed Division) lost his life while thwarting the attempted assassination of President Harry Truman, at a time when President Truman was residing at the Blair House.

16. The Secret Service's statutory responsibilities are carried out by various organizational components. All of these organizational components work together to provide a complete 24-hour-a-day, 365-day-a-year protective envelope surrounding our protectees. I have already noted that a President is protected by the Presidential Protective Division as well as officers from the Uniformed Division. Other Secret Service protective personnel, such as highly trained technical support personnel providing explosives detection, audio countermeasures, and bio-hazard and other threat countermeasures, will also have occasion to be near or in the presence of a President. The large contingent of agents and officers who protect a President is provided with specialized integrated training that is literally unparalleled in terms of rigor and detail. Much of the training provided to U D officers (from firearms to medical training) is identical to that provided to PPD agents. Agents and officers of the PPD and UD participate together in unique simulated crisis training scenarios. These exercises present Secret Service personnel with a

variety of emergency situations involving Secret Service protectees. Agents and officers are trained how to be ready to react properly, and in close conjunction with one another in times of emergency. Because agents of the PPD and UD officers must remain alert at all times, their ranks are constantly shifted. Both the PPD and UD provide 24-hour protection to a President by operating in a series of structured shifts. However, the specific duties of each Secret Service agent or officer assigned to a shift do not remain static. So as to maximize the greatest protective vigilance, many special agents and officers within a shift periodically "push" (or move) to the next in a series of assignments. Without providing specific details, this fluid nature of the protective envelope and specific protective tasks necessarily implies that, for example, an agent may be just outside the Oval Office at the commencement of a shift, and at a more remote post at the end of a shift.

17. As should be clear, the protection of a President is only accomplished through the coordinated efforts of scores of dedicated Secret Service protective personnel. As such, the protective envelope that the Secret Service maintains around a President is effective because it has many overlapping and interlocking functions. Each of these functions and tasks is critical to the accomplishment of the mission, whether a President is within the security perimeter of the White House Complex, or traveling to a remote site. And underlining all these protective efforts is a simple proposition: the Secret Service cannot keep a President safe if its agents or officers are not close to him, and to be welcome in such close proximity to a President, they must enjoy his unqualified trust.

The Protective Relationship

18. With this background in mind, I will attempt to explain the extraordinarily unique relationship that must exist between the Secret Service and a Presidential protectee. Having served on the PPD's of Presidents Reagan, Bush, and Clinton, I can describe this phenomenon in specific detail. There must be an atmosphere of complete trust between a President and his protective detail. This level of trust and confidence cannot be overestimated. For the Secret Service to fulfill its mission, the very movements of a President frequently must be cleared by the Special Agent in Charge of the PPD. Thus, the SAID must, at any given moment, quite literally be in a position to put his hands on the hips of a President to move him in a particular direction out of harm's way. Indeed, to ensure the safety of a President, the SAIC must have the complete discretion to initiate physical contact with a President at any time. We are trained in what we call "hands on" pivotal body mechanics. Stated simply, this means that, any time it becomes necessary to do so, we are trained to grab a President's pelvis and hips to shift him in the desired direction. I have attached, as Exhibit F, a variety of photographs demonstrating the Service's "hands on" approach to protection. By the same token, the level of trust must be so great that a President will be willing to change his entire travel plans if the SAIC deems it necessary to do so. Without revealing any confidences, I can state that certain events, stops, and, indeed, entire Presidential visits have been canceled, when the security of a President could not be guaranteed. Indeed, a President must rely on the Secret Service to decide such things as when and where he can safely

exit his presidential limousine and which routes he can safely take on foot. We would have great difficulty protecting a President's safety if we did not have his complete confidence where matters of technical security are concerned.

19. A trusting and confidential relationship with a President, and the physical proximity permitted by that relationship, is also crucial to the Secret Service's ability to assess and react promptly to signs of physical distress. On more than one occasion, a President has encountered medical difficulties that were recognized by members of the Secret Service either because the protective personnel were familiar enough with the President to understand the symptoms or because it was obvious that the President was having a medical problem. In one publicized instance, on September 15, 1979, President Carter was participating in a ten kilometer race in Catoctin Mountain National Park when it became apparent to the Secret Service protective personnel that the President was having difficulty running. One agent was so close that he was able to grab and steady the President as the President began to falter. I have attached as Exhibit G a photograph depicting this incident. In another instance, a member of the Secret Service recognized a President exhibiting signs of medical difficulty. The Secret Service protective employee who recognized the problem was able to do so because of the close and constant proximity he had over a long period of time with the President. This relationship enabled the employee to alert a physician towards what ultimately turned out to be a medical situation requiring treatment. Accordingly, the proximity of the Secret Service to a President is necessary in

times of medical emergency, as well as emergencies stemming from outside threats.

20. It has been my experience, serving on the protective details for three different Presidents, that each incoming President demonstrates an initial tendency to resist the close protective envelope in which we want to place him. Even though maintaining close proximity is particularly crucial during a transition period, it has been my experience that each incoming President does not sufficiently appreciate the risks he is facing. Quite naturally, they tend to view Secret Service personnel (both inside and outside of the White House) as an obstacle to their privacy and a barrier between them and the American people. For this reason, a natural educational process must take place, during which the Special Agent in Charge must convey how essential proximity is. This is true even for those Presidents who have already had Secret Service protection in a prior capacity. After all, although the protection afforded all of our protectees is rigorous, the President of the United States receives a level of protection that is unparalleled in terms of both intensity and scope. This process is already exceedingly difficult; it would be dramatically compounded if protectees were given reason to be concerned that protective personnel might be called upon to testify about what they were able to see or hear while in such close proximity to their protectees.

21. During my years working on the Presidential Protective Division, I have heard and observed innumerable confidences of the most sensitive nature, regarding both matters of state as well as matters of a personal nature to my protectees. It was at all times my understanding that I would maintain abso-

lute secrecy regarding any and all confidences that I learned in my capacity as a member of the Secret Service in close proximity to a President. Indeed, this was also the clear understanding of my protectees. I have a distinct recollection of having been next to one President when he was being briefed on troop movements in the midst of a war. Before speaking, the aide expressed concern about expressing such highly sensitive, highly classified information in my presence. But the President assured the person that I would maintain complete silence over everything I heard, and the briefing went forward without further interruption. I can recall similar episodes when I overheard or observed details of a highly personal nature because of my close proximity to a President.

22. The trust that the Secret Service must inspire in a President of the United States is twofold. First, a President must trust us completely where matters of security are concerned. A President must also trust that his activities—in private and public— will remain in complete confidence. For the reasons stated, the Secret Service must have unquestioned access and proximity to a President in order to provide the necessary level and intimacy of protection to ensure his safety. Conversely, protectees must know that their actions and words are private and confidential despite the close proximity of their protection.

23. In that regard, I have attached, as Exhibit H, a letter recently written to me by former President George Bush, prompted by newspaper coverage regarding the Secret Service being asked to testify in this matter. In his letter, former President Bush stresses the importance of confidentiality to the

Secret Service's mission. In expressing his view that Secret Service agents should not be forced to testify in this matter, former President Bush states: "What's at stake here is the confidence of the President in the discretion [REDACTED]nce evaporates the agents, denied proximity, cannot properly protect the President." Former President Bush states that he "allowed the agents to have proximity first because they had my full confidence and secondly because I knew them to be totally discreet and honorable." Former President Bush's letter also states to me: "I can assure you that had I felt they would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in."

24. The history of the Secret Service provides a strong foundation for this tradition of unequivocal trust. The motto of the United States Secret Service is "WORTHY OF TRUST AND CONFIDENCE." This tenet is so central to our mission it is emblazoned in the Secret Service Commission Book. I feel so strongly about this creed that when I speak to protective personnel upon their graduation, I tell them that the "most important" factor in the Secret Service Commission Book is the one in which "I commend you to the entire world as being worthy of TRUST and CONFIDENCE." As I state, "the phrase, 'BEING WORTHY OF TRUST AND CONFIDENCE,' is the absolute heart and soul of the United States Secret Service." This trust and confidence cannot be situational. It cannot have an expiration date. And it must never be compromised.

25. This is why the Secret Service has historically maintained that protective personnel should not, and

should not be compelled to, divulge information, whether heard or observed, that is obtained as a result of their protective responsibilities. This confidentiality is a matter of long-lasting institutional culture, and serves as an absolutely necessary component to establishing and maintaining a constant and proximate relationship to any protectee. I am attaching as Exhibit I to this Declaration a true and correct copy of a Secret Service Memorandum titled "Protection for the President," which the Archivist of the Secret Service believes was drafted in 1910. As this Memorandum makes clear, the attitude of the Secret Service has remained unaltered with respect to the need for maintaining absolute confidence over Presidential observations. In the words of the Memorandum, which was submitted to the Secretary of the Treasury:

> I wish to say that the men of this service detailed at the Presidential home in Washington or elsewhere are instructed not to talk of anything they may see or hear. So far as the actions of the President and his family and social or official callers are concerned the men are deaf, dumb and blind. In all the years this service has been maintained at the White House and the freedom with which many important public matters have been discussed in their presence, there has never been a leak or betrayal of trust. * * * * Responsibility in the matter of the safety of the President . . . was accepted willingly when thrust upon us in an emergency, and from the beginning has been regarded as a sacred trust, overshadowing in importance all other duties and responsibilities.

See Exhibit I at 7, 12-13. Given the Secret Service's history of maintaining absolute secrecy regarding information obtained by its protective personnel while in proximity to the President, our protectees have operated under a belief that their statements and actions occurring in the presence of Secret Service protective personnel are absolutely confidential.

The Independent Counsel's Motion to Compel

26. To the best of my knowledge, the Independent Counsel's Motion to Compel is unprecedented because it seeks to compel before the grand jury testimony from current Secret Service personnel regarding information obtained while they or other Secret Service protective personnel were stationed in close proximity to the President. I wish to express my profound concerns regarding the impact that compliance with this Motion to Compel would have upon the Secret Service, both at this time and in the future. In my view, compelling Secret Service employees to divulge either communications overheard or actions observed as a result of protective duties would impose a permanent and devastating impact upon the Secret Service's ability to provide protection to any of our protectees. Indeed, I firmly believe that allowing this testimony to go forward will compromise the entire protective fabric enveloping a President, whether at the White House Complex or on the road. For this reason, I believe that denying this Motion to Compel clearly serves the national security interests of the United States.

27. I have previously described the unquestioned and unparalleled relationship of trust and confidence that has historically existed between a President and the Secret Service. In my view, if any President of

the United States were given reason to doubt the confidentiality of actions or conversations taken in sight or hearing of Secret Service personnel, he would seek to push the protective envelope away, or eliminate some of its components, undermining it to the point where it could no longer be fully effective. As I noted earlier, former President Bush has expressed his views to me in this regard. As he assures me in his recent letter, attached as Exhibit H, "had I felt [Secret Service agents] would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in." Former President Bush states that if a President's confidence in the discretion of the Secret Service evaporates, "the agents, denied proximity, cannot properly protect the President." It is indisputable that a single breach of this confidence, or even the prospect of a breach, brought about by the possibility of compelling Secret Service employees to divulge what is seen or heard while protecting a protectee will invariably alter this important relationship permanently and dangerously. Such a disclosure would make this and future Presidents feel reluctant to speak or act candidly with advisors, confidants and others in the presence of Secret Service protective employees. More importantly, it would harm our ability to carry out our statutorily-mandated protective functions in the manner and nature that has been historically established. I believe the very foundation for ensuring the success and security of a President would be irreparably harmed, if not completely destroyed, if such disclosure were compelled. I further believe the inevitable result would be that a current or future protectee would seek to reposition Secret Service protective

employees in order to ensure privacy and confidentiality or attempt, under some circumstances, to refuse protection entirely, a particularly problematic issue with regard to a President.

28. This evaluation of the impact upon the Secret Service's protective function cannot be overstated for the simple reason that even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President. In this regard, the historical contrast between the successful assassination of President McKinley and the unsuccessful attempt to take the life of President Reagan should prove compelling: distancing Secret Service protective personnel from a President can have irreversible consequences. If, as is now the unbroken practice of the Secret Service, an agent or officer had been in the immediate proximity of President McKinley when he was shaking hands with members of the general public, his assassination might have been thwarted. By contrast, many experts believe that President Reagan's life was saved by a matter of inches. Had the President felt the need to push the protective envelope away by as little as a few feet, world history might have been irrevocably altered. Although these may be the most dramatic examples, the need to maintain close proximity to the protectee exists on a moment-to-moment basis. Even within the confines of the White House, protective personnel are meticulously trained to be ready, if necessary, to be at a President's side within seconds of any breach of White House security. Such breaches are by no means hypothetical. On October 29, 1994, an individual armed with a semi-automatic weapon opened fire (and discharged 29 rounds) at the White

House. President Clinton was in the private residence at the time. Within seconds, Secret Service agents moved to cover the President and move him away from White House windows. Indeed, the agents—who, of course, did not then know the exact nature of the threat directed against the President—were moving to cover the President even while rounds were still being fired at the White House. In another highly publicized recent incident, a Cessna airplane crashed onto the South Lawn of the White House, making contact with the South Wall of the Executive Mansion. Once again, for this purpose, I have only provided the most dramatic and recent examples. But there have been scores of unheralded assassination attempts that have been averted because of our well-established techniques and, most of all, because of proximity. Indeed, the Secret Service has had to thwart gate crashers, fence jumpers, and other trespassers who have attempted to penetrate the grounds of the White House Complex I do not exaggerate, therefore, when I state that maintaining close proximity to a President—wherever he is, including the White House—is an absolute necessity if the Secret Service is to succeed in its protective mission.

29. The threat to national security posed by this Motion to Compel extends beyond even a threat to the life of this and future Presidents. By statute, the Service is responsible for protecting visiting heads of foreign states or governments. Quite naturally this is among the most sensitive and significant work performed by the Secret Service. For obvious reasons, if the assassination of a foreign head of state were ever to occur on American soil, the results could be catastrophic from a national security or foreign relations standpoint. In my opinion, even the possibility that Secret Service agents might be compelled to testify against their protectees could severely impair our ability to protect visiting heads of state. For obvious reasons, this is a highly sensitive issue, but I can state that, within days of the first newspaper stories surfacing that the Independent Counsel might be seeking compelled Secret Service testimony, I was approached by a high-ranking official of a foreign country. I was informed, in no uncertain terms, that, if events developed such that agents were forced to testify regarding observations of their protectees, that foreign nation would seriously consider refusing to allow Secret Service protection in future state visits. If this were to occur, it clearly would have a catastrophic effect on the ability of the Secret Service to complete one of its most important statutory missions—the protection of the life and safety of foreign dignitaries.

Conclusion

30. In sum, I believe that both reason and experience compel the conclusion that the confidence and unquestioned trust existing in the relationship between the Secret Service and a President warrants the Court's complete and unequivocal protection. Indisputably, based upon historical precedent and compelling policy interests, Secret Service protectees have operated with an expectation that their actions and words are confidential and private despite the close proximity of their protection. In addition, I believe a sound and overarching public interest exists to preserve the integrity of our relationship with our protectees. The Secret Service's ability to safeguard

the national security by providing a viable protective envelope around a President and Vice President, their families, and other domestic and foreign leaders, depends on the preservation of that relationship. For all of these reasons, I believe that it is imperative that the protective function privilege be recognized by this Court, and I recommend that the Secretary of the Treasury assert the protective function privilege with respect to the testimony sought to be compelled.

I declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct.

4/21/98
Date

/s/ LEWIS C. MERLETTI
LEWIS C. MERLETTI
Director
United States Secret Service

EXHIBITS A-G

[PHOTOGRAPHS OMITTED IN PRINTING]

EXHIBIT H

GEORGE BUSH

April 15, 1998

Director Lewis Merletti
U.S. Secret Service
Room 800
1800 "G" Street NW
Washington, D.C. 20223

Dear Lew,

I have intended to write you this letter for some time, but today's newspaper coverage regarding the Secret Service's being asked to testify now prompts me to move ahead.

The bottom line is I hope that USSS agents will be exempted from testifying before the Grand Jury. What's at stake here is the protection of the life of the President and his family and the confidence and trust that a President must have in the USSS.

If a President feels that Secret Service agents can be called to testify about what they might have seen or heard then it is likely that the President will be uncomfortable having the agents near by.

I allowed the agents to have proximity first because they had my full confidence and secondly because I knew them to be totally discreet and honorable. Never once did I hear an agent on any detail of mine, Vice President or Presidential, repeat any gossip about anyone they had even covered.

I hope that my family and I conducted ourselves so as to earn their confidence, too, but I can assure you that had I felt they would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in.

I can tell you, sir, that I an deeply troubled by the allegations swirling around there in Washington - distressed at what all this might do to the office I was so proud to hold; but regardless of all of that I feel very strongly that the USSS agents should not be made to appear in court to discuss that which they might or might not have seen or heard.

What's at stake here is the confidence of the President in the discretion of the USSS. If that confidence evaporates the agents, denied proximity, cannot properly protect the President.

Feel free to use this letter with proper authorities in the special prosecutors office, or should the matter go to court, with the proper officers of the court.

Respectfully submitted,

/s/ GEORGE BUSH

EXHIBIT I

MEMORANDUM FOR SECRETARY NORTON

* * * * * * * * * * * *

Protection for the President

Under our form of government is seems necessary for the President to come into close personal contact with the public. This being the case there is always the possibility of annoyance by irresponsible though harmless "cranks", or assault by demented persons with homicidal tendencies.

There has been nothing since 1865 to indicate danger to the President from a deliberate conspiracy. Even among the disaffected classes where there is open abuse of one occupying the presidential chair, and where there is much loose talk about desperate measures to rid the country of the "ruler", the danger lies not in any concerted movement on the part of the ranters and firebrands but in the development of an "individualist." In this class have been most of the assassins of presidents and rulers—men of unbalanced mind who are unconsciously influenced to "act for humanity". These persons consult no one, may not even be known to the rabid anarchist membership, are not identified in any way with the haters of government; they confide in none, make their plans alone and then cunningly seek a favorable opportunity to carry them out.

The danger from the ordinary crank lies in the fact that most frequently he suffers from the delusion that he is followed or persecuted, and that the President either is responsible for his trouble, or can put an end to this "persecution".

These irresponsibilities are usually armed, and were they to gain access to the President might be moved by some crazy freak to attack him; or in defending themselves from fancied enemies open fire or phantoms and wound or kill the President.

In scores—I might say hundreds—of instances during the last eight years we have discovered and quietly sidetracked or arrested people in this class. The President has known nothing of it, and unless there is an arrest no one outside our service knows of the incident, and no one can say what tragedy might have been enacted if one of these persons had reached the President.

The danger is not imaginary—history has proven that. Admitting then, that there is danger how can the President best be protected? After the Buffalo tragedy there was a demand for immediate systematic protective measures. The Secret Service Division with representatives all over the country, able to provide harmonious cooperation wherever the President might be, was thought to be the best equipped to render the desired services.

By direction of the then Secretary to the President and the Secretary of the Treasury, the work was undertaken and the expense borne by the appropriation for suppressing counterfeiting. There was no warrant of law for this action. Congress was not in session but something had to be done at once, the theory being that later Congress would make some provision for the work. Attention was called to the fact that there was no lawful authority for the expenditures in this connection but the Chief of the Service was instructed to go ahead and let him who cared to do so criticize the action.

Congress met, numerous bills were introduced and there were hours of discussion, but nothing was accomplished. The work continued without explicit statutory authority for five years before the expenditures were legalized by a line in one of the appropriation bills. All that time, however, Congress knew the facts and tacitly approved the plan.

In the meantime the years of experience had developed an understanding of the requirements, the systematizing of advance arrangements for a presidential visit, and a general familiarity with the handling of the whole problem. A special force of men, young, alert, courageous, dependable, of clean habits, was developed for this duty and the work has been widely discussed and suggestions have been numerous. They have ranged all the way from no guard at all to the detail of a military squad.

A MILITARY GUARD.

This was among the earliest suggestions, but the public seems disinclined to look with favor, upon men with swords or bayonets standing guard over the President. If the nation were engaged in a war a military guard might be acceptable, but in times of peace in a democratic country the masses apparently balk at soldiery as a presidential accompaniment.

A POLICE GUARD.

This might work out, but possibly would prove no more agreeable to the President that the present arrangements. Police have local jurisdiction only, and the assistance extended during visits to various cities could not well be as closely cooperative as when under present conditions local assistance is rendered by part of the force with which the White House detail

is identified. If a permanent guard were dispensed with and reliance placed in the local forces of cities visited, the President would be surrounded by men who are unfamiliar with his personal habits and methods, which might cause more or less confusion; and furthermore, officers who are not constantly with him are usually more interested in watching him and his movements than they are scrutinizing members of the crowd were the real danger lies.

AN INDEPENDENT DETAIL.

It has been suggested that two or three or four men be appointed to constitute the President's body guard, to be under the immediate direction of the Secretary to the President. This would be an admirable arrangement if the Chief executive remained always in Washington. But when he visits other cities should there not be cooperation in advance arrangements, reinforcements to meet special conditions and so on? From what source should that additional force be drawn? Would municipal cooperation as a courtesy be satisfactory, or should there not be an outside force under the direction of an administrative officer in Washington available for all sorts of emergencies, and wholly under government control?

IMPERFECT AT BEST.

Conditions in the United States are such that the authorities are seriously handicapped at the very outset. We have no arbitrary control over public gatherings. We cannot prescribe such regulations as are considered essential abroad during a public appearance of the Chief Magistrate.

We have to combat in some quarters a lack of veneration and respect for an official no matter how

exalted his station. The public washed and unwashed demands the right to approach the President, to swarm about him in crowds, to grasp his hands, to pat him on the back, to "jolly" him. The great American public, or a certain part of it at least is no respecter of persons, and the slightest incident may turn a merely curious crowd into a hooting mob. Doubtless you have seen something of this spirit on railway trips.

In the absence of monarchial conditions, and in the fact of the freedom of speech and action exercised by the public, the task of extending protection is one of manifold difficulties.

There is no such thing as absolute protection either here or abroad. A fanatic or maniac intent upon murder and willing to sacrifice his own life can reach his victim in spite of any precautions short of deliberate seclusion in a bomb proof chamber. A rifle in the hands of a desperate man and a window overlooking the line of march would solve the problem in almost every instance.

Happily in this country there is not the intense personal feeling against the Chief executive that exists abroad against an Emperor or King; but our practice of permitting the close physical relations of President and public provides an opportunity for mere cranks that creates a menace unknown abroad.

The general practice of the service in the matter of protection may be treated briefly in its various phases as follows:

DURING BUSINESS HOURS.

When the President is in Washington two of our men are on duty at the Business office all day. They are instructed carefully to inspect all callers, and

diplomatically to approach those whose actions or appearance are at all abnormal. In this manner many undesirable and dangerous persons have been led away quietly, or, in some instances were deadly weapons have been found in their possession, have been escorted out of town or sent to the municipal building for the inspection of the Sanitary officers.

In this connection I may say that we are opposed to publicity in the matter of cranks because stories of cranks at the White House seem to breed cranks. Furthermore the protection of the President is a tabooed subject and we forbid newspaper interviews about protective measures. It usually happens, however, that where we turn a crank over to the police there is a story given out at the municipal building. This we cannot control, though we think it is unwise to exploit such matters.

INFORMAL CALLERS.

During the Congressional season there are almost daily informal receptions at which the President meets delegates and sightseeing excursion parties introduced by members of Congress or other dignitaries. It would not be difficult for an evilly disposed person to identify himself with one of these parties and thereby get to the President. For this reason at all of these informal hand shaking affairs the operative in charge at the White House takes his place by the President on the side from which the line approaches where he can have an unobstructive view of each caller, and near enough to the President to act in an emergency. A second agent is so placed that he can inspect and "size up" the visitors as they approach.

NEW YEARS DAY.

This same arrangement is followed at all White House functions of a public character. On New Year's day when the doors are thrown open to everyone who cares to come, additional men are detailed to look closely after the thousands of people, black and white, well-to-do or otherwise, who gather to wish the President the compliments of the season.

We think notice should be served by the police officers *outside* the White House that persons carrying bundles or packages of any description will not be admitted. Such action will save confusion inside and eliminate a source of occasional annoyance and embarrassment.

WALKS.

When the President leaves the White House for a walk he is accompanied by one or two agents (the number depending upon the hour) who keep near enough to him to be available in an emergency and far enough away so that his privacy is not in any way invaded. In this connection I wish to say that the men of this service detailed at the Presidential home in Washington or elsewhere are instructed not to talk of anything they may see or hear. So far as the actions of the President and his family and social or official callers are concerned the men are deaf, dumb and blind. In all the years this service has been maintained at the White House and the freedom with which many important public matters have been discussed in their presence, there never has been a leak or betrayal of trust.

THEATRE.

When he goes to the theatre arrangements are made for one agent in a seat so located as to command the approach to the front of his box, and another agent is stationed where he can control the entrance to the back of the box.

Unless the matter is given the Secretary's personal attention and forbidden, the presidential chauffeurs, footman and uniformed police officers and two or more plain clothes men from police headquarters assigned to the theatre will follow in after the President and line up against the wall at the side of the house. This naturally attracts a good deal of attention and occasionally results in delay in getting the President's car to the door. This crowd of a half a dozen or ten persons by some of the public is identified with the presidential body-guard and perhaps is responsible for some unfavorable comment.

EVENING SOCIAL ENGAGEMENTS.

In these affairs we only aim to have someone about the premises in case of an emergency. Where the host of the evening makes no provision for shelter our agents remain outside with the police officers until the President returns to the White House. Frequently, the President will accept two or more invitations for the same evening—say an Insurance Convention dinner at one of the hotels where he is to make an address and later on a supper or reception or ball at some private residence. For the first affair which is a formal function among strangers our agents ____ evening dress so that they may be about the President and at the same time be inconspicuous. When the President leaves for his second affair un-

less one of the men be taken with him in his car, we arrange for a taxicab, and by an understanding with the presidential driver so time matters that we shall arrive at his destination a moment ahead of him.

It seems to me that it would be entirely feasible and proper to arrange with the host of any private function for one or two seats in a part of the reception hall or library or other unused room where the men of the service might remain in comfort during the evening.

OUT OF TOWN TRIPS.

You are familiar in a general way with our procedure when the President is on tour.

An agent provided with a detailed program which has been approved by the Private Secretary reaches the city to be visited well in advance of the fixed date. He bears credentials from the White House as a member of this service assigned to the advance arrangements for the safety and comfort of the President.

He verifies the general plan of entertainment.

Goes over the route of parade with the chairman of the Committee and Chief of Police.

Arranges for guard ropes at all points where the conditions demand it.

Agrees exactly upon the location of official vehicles and occupants thereof with due regard to the general rules of precedence.

If there is to be a banquet special arrangements are made for the investigation of all waiters and particularly those assigned to the head table, and the seats

for our agents are so located as to control access to the President. Attention is given to the location of windows and where necessary, arrangements are made for stationing police officers outside.

Conditions being unusual, where the hall is lavishly decorated with light and inflammable material a fireman with a chemical extinguisher is stationed close by the main entrance to the dining hall and another between the dining hall and kitchen.

Arrangements are made for easy access to vehicles on all occasions and their arrival and departure is provided for at the several points.

GENERAL PLAN OF PROTECTION

The men detailed to protective work are impressed with the importance of being everlastingly on the alert, and never forgetting for a moment what they are there for.

They are expected to dress as nearly as possibly like the members of the presidential party and thus avoid becoming conspicuous. Their training has been such that they are quite at home in any society and would not be out of place anywhere with the President from an Eastside patriotic meeting to a ball room.

They are trained to watch the crowd.

The Chief operative of the detail is always on the immediate right of the President; his principal assistant on the left. In close quarters a third man is assigned to drop in immediately behind the President. Under certain conditions a fourth man may open a clear way ahead of the party.

On visits to outside cities the second vehicle is reserved for one of the regular presidential detail

with men assigned from our local force. These men have a clear view of the approaches to the President's car from the rear, and keep a close watch on the crowds lining the walks and also observe the groups in windows or on roofs along the route. Whenever stops occur where the crowd is close the men from the rear car close in on the forward one and cover it from side and back each man having his station assigned in advance.

AT THE SUMMER RESIDENCE.

In the absence of police protection at the President's summer residence it became necessary to provide a force which supplemented the ordinary body guard, and which made it possible properly to look after the official premises night and day. Being some distance from town and the officer, automobiles have been provided to convey the men to and from town at the hours of changing watch.

In the past when the President has gone out for an automobile ride we have only been able to give him the necessary attention by sending a man in a following car.

It has been suggested that a man on a motor cycle would be better. Perhaps in some agencies and under some conditions a motor cycle could be used, but it seems to me that the ideal and proper solution of the problem is to have it understood that on all motor trips the seat beside the Chauffeur belongs to the Presidential guard. That will do away with "a procession" on such trips and will be less conspicuous than to have a follower of any kind.

In close contact with crowds as when leaving a baseball enclosure or moving slowly through a

densely crowded street our men properly and advantageously may stand on the running board of the machine, but this should not be necessary at other times.

SPEED WHEN MOTORING.

In this connection I beg to direct your serious attention to the fact that the pace of the President's car should be regulated absolutely by you in such a way as to loave no room for criticism in case of an accident. It is not right to hurtle the President over country roads at forty or fifty miles an hour. Thirty miles an hour is the limit of safety for a concentrative motorist; anything in excess of that simply invites disaster. And thirty miles an hour is possible with safety only under ideal conditions.

We have an understanding with the police authorities in New York that the speed of the police car which sets the pace for the President's car shall not exceed twenty miles an hour through traffic.

The speed with which the President's car has been driven at times both here and outside of Washington has been the subject of much unfavorable comment; and while there has been no unfriendly criticism publicly, I feel that if as a result of the bursting of a tire or the breaking of a steering connection or an axle, the President should be hurt, you would be censured for permitting fast driving, and we should all be told that we have known that an accident was inevitable.

AS TO ANARCHIST SOCIETIES

I have taken my own methods of keeping in touch with the centers of activity among the so called "Reds". These methods I will be glad to explain verbally but prefer not to include the details here. It

will be sufficient perhaps to say that I am constantly advised of the movements in this country, and am fully informed as to the visits of any well known members from abroad. There is nothing in the situation to cause uneasiness. There is no concerted movement of a hostile character. Abusive speeches are made an privately the Chief Executive is reviled. But the movement lacks funds and organization, and at present has no leaders willing to risk their liberty by fomenting any aggressive action.

NEED OF PRESIDENTIAL COOPERATION.

A President himself perhaps may not be heartily in sympathy with the protective proposition. The general sentiments of the public are friendly. No concrete danger threatens. He sees no hostile demonstration but in spite of the peaceful conditions he finds at least two agents always at his side. He chafes under it, finds it irksome, and wishes it might be dispensed with. But perhaps when one becomes President he forfeits the right to expose himself to danger of any sort. He becomes an object of solicitude to the people. They demand that he shall be shielded from any possible harm, and that if necessary he must risk his own personal desires in order that his official existence may be safeguarded.

Presidential antagonism to protective measures multiplies the difficulties of the problem and seriously affects the efficiency of the guard. Keenly alive to the mental attitude of their charge they are fearful of increasing that opposition, and are unable to give to their work the undivided attention it demands. Were anything to occur it would not satisfy the people to say that the President objected to protection. Those who were in a position to provide protective measures

and did not do so would be told that it was in sympathy with it or not.

One needs only to turn back to the record of events following the Buffalo tragedy to find what the public temper is, under these conditions.

RESPONSIBILITY.

Responsibility in the matter of the safety of the President must be centered. It cannot be divided. Nor can the individual charged with that responsibility unload it upon another. Municipal authorities may assert that when the President visits their city they assume the responsibility for his safety, but if anything were to happen today, who must stand the storm of criticism and condemnation—the police? The mayor? The reception Committee?

No! The Secret Service, whose appropriations provides for the protection of the President. No matter what the combination of circumstances might be, the service would be held responsible by the public at large. You cannot divide that burden. It must be borne by one man and is not a light burden. It is an honor to have been entrusted with a matter of such grave importance but the honor was unsought. It was accepted willingly when thrust upon us in an emergency, and from the beginning has been regarded as a sacred trust, overshadowing in importance all other duties and responsibilities.

COST.

The total expense charged against the appropriation for suppressing counterfeiting on account of protection for the President averages about fifteen thousand dollars ($15,000.000) per annum.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)
IN RE GRAND JURY SUBPOENAS

FILED UNDER SEAL

DECLARATION OF ELJAY B. BOWRON,
FORMER DIRECTOR, U.S. SECRET SERVICE

I, Eljay B. Bowron, declare as follows:

1. I served as the Director of the United States Secret Service from December of 1993 until May of 1997, at which time I retired from the agency. Since October of 1997, I have served as the Assistant Comptroller General for the Office of Special Investigations in the General Accounting Office.

2. I submit this declaration because I believe that if Secret Service officers or agents can be compelled to testify regarding what they or other Secret Service personnel have observed about the President's activities while they were protecting him, their ability to protect the current and future Presidents will be jeopardized. Based on my more than 22 years of experience with the Secret Service, including my tenure as Director, I believe that compelling Secret Service personnel to so testify will irreparably harm

the relationship of trust and confidence the Secret Service must have to protect the life and safety of the President. Were a President to push away the protective envelope of Secret Service personnel out of concern that they could later be called to testify about their observations of Presidential activities, there could be, I believe tragic consequences.

3. Before joining the Secret Service, I received a Bachelor's degree from Michigan State University and served for a year as a police officer in Detroit. I first joined the Secret Service as a special agent assigned to the Chicago Field Office in 1974. Before becoming Director, I served in a range of operational and supervisory assignments within the Secret Service, at both the agency's headquarters in Washington, D.C., as well as its field offices in Chicago, Atlanta, Miami, and Houston. From 1985 to 1989, I served in the Intelligence Division of the Secret Service, where my responsibilities included recommending appropriate security measures based on intelligence information we acquired from a variety of sources. I also accompanied Presidents on numerous foreign trips, including during my tenure as Director. From 1987 to 1989, I served as the Assistant Special Agent in Charge of the Intelligence Division, and from 1991 to 1993, I served as the Special Agent in Charge for the Atlanta Field Office when it began planning for the 1996 Summer Olympics. From August 1993 to December 1993, immediately before my appointment as Director, I served as Assistant Director of Protective Operations at the Secret Service's headquarters.

4. As Director, I was responsible for supervising all aspects of the Secret Service's mission, including

the agency's protective and investigative functions. I oversaw all administrative and operational components of the Secret Service and was ultimately accountable for the agency's successful fulfillment of its mission. This declaration is based on knowledge I gained through my experience as Director, as well as my 22 years as an agent in various operational and supervisory positions in the Secret Service.

5. For the Secret Service to do its job of protecting the President effectively, proximity is everything. The Secret Service's philosophy involves maintaining a protective envelope or "protective bubble" around the President at all times. The linchpin of this philosophy is the Secret Service's ability to obtain immediate physical access to the President in order to protect him and, if necessary, move him to safety.

6. Both the Uniformed Division ("UD") officers and PPD agents who are physically proximate to the President are critically important in implementing this philosophy. The protective envelope that the Secret Service maintains around the President is effective because it has many overlapping and interlocking functions. While the PPD personnel who stand next to the President may embody the popular idea of the Secret Service agent, they could not effectively perform their job without the officers in the Uniformed Division, who are also essential. It is only through the combined efforts of these two divisions that the Secret Service can protect the President's physical safety. That is especially apparent in the event of a breach of security at the White House, in which the UD officers, by securing the area, make it possible for the PPD agents present to cover the President and evacuate him to safety.

7. Even within the White House complex, Secret Service personnel must be ready to gain immediate access to the President in the event of a breach of White House security, or even a medical emergency. The White House is a public place and an office building. Large numbers of people who do not work at the White House, and who have never been subjected to a background investigation, daily enter the White House, after limited checks. Apart from the threat of terrorists and the like, Secret Service officers and agents are taught that even people without any prior criminal records, can attempt to do harm to the President, possibly because of mental instability. In addition, well-known incidents in recent history—such as a plane crash on the South Lawn and an individual opening fire with a semi-automatic weapon at the White House—confirm that Secret Service officers and agents must be prepared to react within the confines of the White House and must have the same type of immediate access to the President necessary elsewhere.

8. Because Secret Service officers and agents must have immediate physical access to the President, it is unavoidable that they will be exposed to highly sensitive information, whether it concerns military and diplomatic secrets, political strategy, or personal and family matters. For this reason, the importance of confidentiality is a theme that runs throughout the Secret Service. The need for confidentiality is repeated stressed—in training, briefings, talks to new officers and agents, as well as in conversation. The expectation of confidentiality is, in many respects, similar to the expectation that Secret Service officers and agents will, if necessary, jeopard-

ize their own lives and safety in an effort to protect the President. Both are essential to the mission of the Secret Service. And, just as Secret Service officers and agents have never been asked to take an oath that they would risk their own lives to protect the President's, they have similarly never been asked to sign confidentiality agreements. Rather, these unwritten rules are so deeply embedded that they are a core part of the very culture of the Secret Service.

9. If Secret Service officers or agents could be called to testify about the President's activities, I believe that the relationship of trust and confidence that must exist between the President and those Secret Service personnel assigned to work in physical proximity to him, would be seriously threatened, if not entirely destroyed. And without that trust and confidence, it would be natural for a President or other protectee to try to "push away" agents and officers at certain times to avoid their hearing or seeing matters which a President wants to keep confidential.

10. This risk that a President would attempt to push away Secret Service officers or agents to the detriment of his own safety is, in my view, a real and substantial one. In my experience, Presidents, especially when they are new to that office, do not fully appreciate the danger they face, the degree of danger they face and just how dramatically it rises on the day they assume office. An incoming President must go through a learning process through which he comes to better appreciate the dangers inherent in the position of President. In my experience, it is natural for a President, especially initially, to resist sometimes the intensive measures the Secret Service

takes to ensure his safety 24 hours a day, 365 days a year. Whether it is a question of a President adhering to his accustomed exercise regime or attending public functions, Presidents often chafe at the level of protection the Secret Service provides and the attendant lack of privacy. Even a President who has previously had protection while in other high governmental positions, such as the Vice-Presidency, will find that there is an enormous difference in the level of protection they receive as President. Simply put, the level of protection afforded the President by the Secret Service is unparalleled in the federal government.

11. As a result of having gone on nearly all of the President's foreign trips during my tenure as Director, as well as my years of service in the Intelligence Division, I am acutely aware of the serious ramifications that would result should Secret Service officers and agents be forced to testify about the activities of the President. These consequences are especially significant in light of the greater frequency with which Presidents travel abroad in the last two decades. When the President travels overseas, it is by virtue of the good graces of the host country that the Secret Service is able to do its job. Sovereignty issues frequency arise during foreign trips: from the Secret Service's access to royal palaces, to its ability to carry guns, to the Secret Service's ability to insist that the President travel in his own limousine brought over from the United States, there are any number of ways that host countries may object to the Secret Service's security measures. Requiring Secret Service officers to testify in the Independent Counsel's investigation will serve to complicate these

already problematic issues associated with the President's foreign travel.

12. Based on my experience, I believe that foreign officials will be more reluctant to accommodate the Secret Service's extensive security measures if they fear that Secret Service officers and agents cannot be trusted to keep their observations of protectees including foreign leaders confidential. For example, I expect that foreign officials will become increasingly wary of granting Secret Service personnel access to their sensitive/secure areas, or of allowing them to be with the President and a foreign leader inside a limousine. I similarly expect that heads of foreign governments visiting the United States—who also receive Secret Service protection by law (18 U.S.C. 3056)—will resist the Secret Service's security measures and proximity.

13. In understanding these ramifications on the Secret Service's work, it is important to bear in mind that, based on my experience, foreign officials will not appreciate the legal nuances and distinctions concerning when and under what circumstances Secret Service officers and agents can be used as witnesses. The mere fact that the issue of forcing Secret Service agents or officers to testify has surfaced is likely to make foreign governments less willing to accommodate the Secret Service both with respect to the protection of the President on foreign trips and the protection of foreign heads of state traveling in the United States.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ELJAY B. BOWRON
ELJAY B. BOWRON

Executed On

4/21, 1998

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)
IN RE GRAND JURY SUBPOENAS

FILED UNDER SEAL

DECLARATION OF JOHN W. MAGAW,
FORMER DIRECTOR, U.S. SECRET SERVICE

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1. I, John W. Magaw, served as the Director of the United States Secret Service from February of 1992 until October of 1993, at which time I was appointed the Director of the Bureau of Alcohol, Tobacco, and Firearms, the position in which I currently serve. I was assigned to the protective details of the Secret Service for seven Presidents, starting with President Johnson through President Clinton. During my career with the Secret Service, I worked in a wide variety of components, serving in both operational and supervisory capacities, including assignments on the permanent security details of Vice President Agnew, Vice President Ford, and George Bush, both when he was Vice President and President.

2. I offer this declaration because of my concern, based on my 26 years of experience at the Secret Service, that compelling Secret Service officers or

agents to testify about information they acquired while serving in a protective function will seriously jeopardize the Secret Service's ability to protect the life and safety of current and future Presidents and foreign heads of state. Without the assurance that the Secret Service officers and agent charged with protection cannot be compelled to testify about observations of a President's activities, a President will seek to push Secret Service officers and agent away in order to maintain his privacy. Under those circumstances, the Secret Service cannot effectively carry out its mission of protecting the President's life and safety.

3. I earned a B.S. in education from Otterbein College in Westerville, Ohio in 1957. After teaching school for several years and then serving as a state highway patrol officer, I joined the Secret Service in 1967 as an agent in the Columbus, Ohio field office. Until my appointment as Director in February 1992, I had 14 different assignments with the Secret Service, in both operational and supervisory capacities. In addition to the assignments previously mentioned, I also served at the Intelligence Division, the Office of Training, the Technical Security Division, and the Office of Inspection. I served as the Special Agent in charge ("SAIC") of the Dignitary Protection Division and then the Washington Field Office. I subsequently served as the Deputy Assistant Director for Protective Research and then in the same position for Protective Operations. Immediately before my appointment as Director, I served as the SAIC in charge of security for President Bush and the First Family.

4. The Secret Service maintains a protective envelope around the President at all times. This protective envelope consists of layers, or rings, of protection, each designed to work in tandem to prevent a would be assailant from getting to the President. The success of this effort depends on the Secret Service's proximity to the President, and its ability to obtain immediate physical access to the President in order to protect him and move him to safety, as appropriate.

5. Even within the White House, the Secret Service must maintain physical proximity to the President in order to protect him effectively. Despite the extensive security measures in place at the White House, portions of the White House are open to the public and cannot be made perfectly secure without Secret Service personnel in very close proximity to the President.

6. Daily, individuals and groups come into the White House. While the Secret Service electronically screens and conducts name checks of people, the Secret Service doe snot require (and could not feasibly perform) background investigations for everyone who enters the White House complex. Consequently, individuals who are admitted to the White House complex can pose a threat to the President's safety. Likewise, even those individuals who regularly come into close contact with the President cannot be ruled out as potential sources of danger to the President. The Secret Service continually studies assassination attempts that occur around the world. As this examination makes clear, a substantial number of assassination attempts on government leaders around the world are made by political allies, advisers, and relatives.

7. On foreign trips, the need for constant physical access to a President is heightened. At such times, the Secret Service sometimes lacks the ability it enjoys within the United States to perform thorough safety sweeps of areas the President will visit. For this reason alone, physical proximity to a President is particularly critical during foreign travel.

8. Unfortunately, it is not unusual for foreign governments hosting a President or Vice President to object to the Secret Service's extensive security measures, including the presence of Secret Service personnel during sensitive discussions with foreign leaders. The Secret Service's security measures must be arranged in advance, because without the host country's advance agreement, the Secret Service may find that its officers and agents are physically blocked from entering certain areas on foreign trips. And, at that point, there is little the Secret Service can do without creating a diplomatic incident, which should, of course, be avoided. The foreign government's trust of the Secret Service is vital to making advance plans.

9. Should Secret Service officers and agents be compelled to testify, this will make the Secret Service's job of protecting the President while abroad even more difficult. If Secret Service personnel can be compelled to testify concerning what they observe and hear while in proximity to their protectees, then foreign countries will be even more reluctant than they already are to allow Secret Service officers to be present during highly confidential discussions.

10. In my view, neither Presidential Protective Division ("PPD") agents nor Uniformed Division) ("UD") officers should be forced to testify about a

President's activities. Agents and Uniformed Division officers depend on one another and each plays an essential role. For example, in the event of a security breach, PPD agents typically rely on UD officers present to secure the areas: to seal it off, keep alert for any intruders or suspicious activity, and move visitors and staff out of the way. If a distinction were to be drawn between UD officers and PPD agents with respect to whether they could be compelled to testify, and UD officers were then "pushed away" by a President, that would seriously jeopardize a President's safety. The result would be that the Secret Service would be forced to utilize its PPD agents to fulfill the role currently performed by UD officers, since the PPD cannot effectively do its job without the UD (or its equivalent) in place to perform its function.

11. Secret Service officers and agents are frequently privy to highly confidential information of all sorts. This is certainly true on foreign trips, where Secret Service personnel hear highly sensitive conversations and also observe the personal interactions between the President or Vice President and foreign leaders. For example, as a PPD agent, I accompanied Vice Presidents traveling to the funerals of foreign heads of state. On such trips, I obtained information that, while not necessarily classified, was highly confidential nonetheless. In connection with such funerals, a Vice President often conducts the United States' first official meeting with the new head of state. Such meetings are critical because they may establish the personal relationship between the Vice President and a foreign leader and because they may

set the tone for our relations with the country under its new leadership.

12. Despite the sensitive nature of such initial interactions between a Vice President and a new foreign head of state, I was allowed to be present so that I could protect the Vice President. But for the extraordinary degree of trust between the Secret Service and its protectees, I cannot imagine that I would have been allowed to be present during such highly confidential meetings. And, without such access, I would have been unable to effectively protect the Vice President.

13. Within the United States, Secret Service personnel are exposed to sensitive information of a similar nature. For example, as the SAIC of PPD during Operation Desert Storm, I was present at briefings by Pentagon officials and was also specifically kept informed of our unfolding military actions so that the Secret Service could move quickly to provide extra protection for the First Family, as needed. I have also been privy to many discussions of personal and family matters affecting a President. Secret Service personnel are often privy to confidential information about the heads of foreign states who come to visit the United States (during which time they are protected by the Secret Service). There may be instances in which information about foreign leaders must be shared in confidence with the Secret Service in order for it to be able to safeguard their physical safety.

14. Needless to say, in light of the sensitive information to which they are routinely exposed, Secret Service officers and agent must enjoy an extraordinary degree of trust by Presidents and other protec-

tees, such as visiting heads of foreign countries. From my first day with the Secret Service, the importance of maintaining that trust was instilled in me. I can remember the Special Agent in Charge sitting me down on my first day on the job and telling me that I would be severely disciplined/fired if I was not discreet regarding the things I learned while serving in a protective capacity. The need for confidentiality was similarly stressed in my training as an agent. As an instructor myself years later, I, too, placed great emphasis on the duty of confidentiality. An agent's or officer's duty not to talk indiscreetly about what he or she learns in a protective environment is a primary rule of the Secret Service. The only exception to this unwritten rule would be the observation of an obvious criminal act.

15. As I have indicated above, I have serious concerns that a President will try to distance himself from Secret Service officers and agents to his peril, if Secret Service agents or officers can be compelled to testify about Presidential activities. This concern stems in part from my experience that Presidents frequently do not fully appreciate the danger they are in on a daily basis because of the office they hold. In my experience, Presidents tend not to fully appreciate the danger they face, in part because they do not want to show fear, and in part because they are so preoccupied with world events that they simply do not think about it.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JOHN W. MAGAW
JOHN W. MAGAW

Executed On

4/20, 1998

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 98-148 (NHJ)
IN RE GRAND JURY PROCEEDINGS

FILED UNDER SEAL

DECLARATION OF ROBERT E. RUBIN
UNITED STATES SECRETARY OF THE TREASURY

---

1. I, Robert E. Rubin, serve as the United States Secretary of the Treasury. As part of my duties as Secretary of the Treasury, I am responsible for the direction of the United States Secret Service. *See* 8 U.S.C. § 3056(a)(1)("Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the . . . President . . . .")

2. I am aware that the Office of the Independent Counsel (OIC) has moved to compel the testimony of the United States Secret Service Uniformed Division officers regarding information they, or other Secret Service officers and agents, may have learned while protecting the President. I am also aware that the OIC has moved to compel the testimony of [REDACTED] to the Secret Service regarding, inter

alia, information he may have acquired from these Secret Service officers.

3. I have personally reviewed the Declaration of the Director of the Secret Service, Lewis C. Merletti, which is to be the Court on April 21, 1998. I expressly adopt the reasoning and conclusion set forth in the Declaration of Director Merletti regarding the need for a protective function privilege to protect the life and safety of this and future presidents.

4. Therefore, at the recommendation of Director Merletti and after consultation with the Attorney General, in my capacity as the Secretary of the Treasury, I hereby formally assert the protective function privilege in *In Re Grand Jury Proceedings*, Misc. No. 98-148 with respect to the testimony sought to be compelled.

I declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct.

Date	ROBERT E. RUBIN Secretary U.S. Department of the Treasury

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Division No. 94-1

IN *RE*: MADISON GUARANTY SAVINGS
& LOAN ASSOCIATION

[Filed: Jan. 16, 1998]

ORDER

Before: SENTELLE, PRESIDING, BUTZNER and FAY,
Senior Circuit Judges

Upon consideration of an oral application for the expansion of jurisdiction of an Independent Counsel provided to this Court on behalf of the Attorney General on January 16, 1998, it is hereby

ORDERED that the investigative and prosecutorial jurisdiction over the following matters be referred to Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel as an expansion of prosecutorial jurisdiction in lieu of the appointment of another Independent Counsel pursuant to 593(c)(1):

(1) The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon

his as a result of the August 5, 1994, order of the Special Division of the Court and all subsequent orders concerning jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

(2) The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones* v. *Clinton*.

(3) The Independent Counsel shall have jurisdiction and authority to investigate related violations of federal criminal law, other than a Class B or C misdemeanor or infraction, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

(4) The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

(5) The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

It is further ORDERED that this document and its contents be and remain UNDER SEAL absent further Order of this Court. This the 16th day of January, 1998.

Per Curiam
For the Court:

/s/ MARILYN K. SARGENT
MARILYN K. SARGENT
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUL 24 1998
OFFICE OF THE CLERK

No. 98-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Independent Counsel
JOSEPH M. DITKOFF
BRETT M. KAVANAUGH
Associate Independent Counsel
1001 Pennsylvania Ave., N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under Fed. R. Evid. 501, this Court should create a new common-law "protective function privilege" that would authorize law enforcement officers of the United States Secret Service to refuse to testify before a federal grand jury.

PARTIES TO THE PROCEEDING

The parties are the United States, represented by Kenneth W. Starr, Independent Counsel; Robert E. Rubin, Secretary of the Treasury, in his official capacity; and Lewis C. Merletti, Director of the United States Secret Service, in his official capacity.

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v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc (Pet. App. 28a-34a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing and suggestion for rehearing en banc was denied on July 16, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE AND STATUTES INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

28 U.S.C. § 535(b) provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . .

18 U.S.C. § 3056(a) provides:

> Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel Kenneth W. Starr ("OIC"), filed a motion to compel officers of the Secret Service's Uniformed Division to testify before a federal grand jury sitting in the District of Columbia. That grand jury is investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential

witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*." Pet. App. 97a. The district court granted the motion to compel, and the court of appeals affirmed.

1. Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. In December 1997, Ms. Lewinsky was placed on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation and was served with a subpoena requiring her to testify at a deposition in that case. On January 7, 1998, Ms. Lewinsky executed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

This Office subsequently received allegations (i) that Ms. Lewinsky's affidavit was false because she had in fact had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case. On January 15, 1998, the OIC presented evidence relating to these allegations to officials of the Department of Justice. The next day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. In response to the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . ." Pet. App. 97a. On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

From the beginning of its inquiry into this matter, the OIC has received—and continues to receive—numerous and credible reports that Secret Service personnel have

evidence relevant to the investigation. Specifically, the OIC is in possession of information that Secret Service personnel may have observed evidence of possible crimes while stationed in and around the White House complex.

2. On January 27, 1998, representatives of the OIC met with representatives of the Secret Service to discuss the issue of testimony by Secret Service employees. The Secret Service asserted that some testimony by its personnel would be covered by a "protective function privilege."

On April 10, 1998, the United States, represented by the OIC, moved to compel Secret Service witnesses to testify regarding the matters as to which they had previously invoked the proposed "protective function privilege." In an opinion and order entered May 22, 1998, Chief Judge Norma Holloway Johnson granted the motions to compel. Pet. App. 15a-27a.

Chief Judge Johnson began her analysis by describing the nature of the privilege that the Secret Service had asserted. The court observed that "[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service." Pet. App. 15a.

Turning to the decisions of this Court that govern the creation of proposed new privileges, the district court held that Fed. R. Evid. 501 and this Court's precedents require courts to consider "1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests." Pet. App. 16a-17a (citations omitted). After describing the traditional reluctance of the federal courts to create new evidentiary privileges, Chief Judge Johnson briefly summarized this Court's recent decisions regarding the subject, noting that new privileges are far more frequently rejected than recognized.

The district court next considered the history of the proposed "protective function privilege" in federal law. Recognizing that no court has ever adopted the privilege,

and finding no constitutional, statutory, or common-law basis for it, the district court proceeded to analyze the two federal statutes relevant to the issue: 18 U.S.C. § 3056(a) and 28 U.S.C. § 535(b). Section 3056(a), the court observed, requires the President and Vice President to accept the protection of the Secret Service, but does not create an evidentiary privilege for its employees. Section 535(b), in turn, imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisory authority (normally, the Attorney General). The district court's analysis of this latter statute in particular led it to conclude that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Chief Judge Johnson noted that the Secret Service has never attempted to assert the "protective function privilege" on any of the various occasions in which its employees have testified in the past. Accordingly, "the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege." Pet. App. 21a.

Turning to the history of the proposed privilege in state law, Chief Judge Johnson observed that "[n]o state has ever recognized a protective function privilege or its equivalent," and that this "absence of any state support for the privilege not only militates against recognizing [it], but also distinguishes it significantly from the patient-psychotherapist privilege recognized [by the Supreme Court] in *Jaffee*." Pet. App. 21a. The fact that no state has ever adopted a "protective function privilege" for its governor, the court reasoned, indicates that the "reason and experience" that Fed. R. Evid. 501 requires for the

creation of a new privilege are lacking. Pet. App. 21a-22a.

The district court also examined the public policy justifications for the "protective function privilege" advanced by the Secret Service, including its argument that if testimony were compelled from its employees, "current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive." Pet. App. 22a. The court acknowledged that "[t]he physical safety of the President of the United States is clearly of paramount national importance." *Id.*

After carefully weighing the Secret Service's policy and fact-based arguments, however, the district court rejected them. "While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril." Pet. App. 22a-23a. The basis for this conclusion was the district court's refusal to credit "the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to 'push away' his protectors," and its concomitant finding that "[w]hen people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." *Id.* at 23a. Moreover, the court reasoned, it is by no means clear that a President "would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts," because such actions "are extremely unlikely to become the subject of a grand jury investigation." *Id.* In short, "[t]he claim of the Secret Service that 'any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation' is simply not plausible." *Id.* (citation omitted).

Finally, the district court noted that previous published accounts of candid observations of Presidents have not

caused them to push their protectors away. Pet. App. 23a. Presidents have a "very strong interest" in protecting their own physical safety, the court found, and the Secret Service's educational process with regard to incoming Chief Executives will continue to instruct them of "the vital importance of close proximity" and the corresponding danger of any ill-advised "pushing away." *Id.* at 24a.

3. The court of appeals affirmed.[1] The court began "with the primary assumption that there is a general duty to give what testimony one is capable of giving." Pet. App. 5a (citations omitted). Thus, privileges " 'are not lightly created nor expansively construed.' " *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

The court emphasized that, under this Court's case law, a party seeking judicial recognition of a new evidentiary privilege under Rule 501 must demonstrate "that the proposed privilege will effectively advance a public good." Pet. App. 6a. "In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to 'push away' his protectors in situations where there is some risk to his safety." *Id.* As to newly asserted privileges, "[e]ven in cases where the proposed privilege is designed in part to protect constitutional rights, the Supreme Court has demanded that the proponent come forward with a compelling empirical case for the necessity of the privilege." *Id.* at 6a-7a.

The court then turned to the policy arguments for and against the asserted "protective function privilege." Notwithstanding the Secret Service's predictive judgments about the behavior of the President, judges "must also assure [them]selves that those conclusions rest upon solid

[1] This Office, on behalf of the United States, filed a petition for a writ of certiorari before judgment. The Court denied that petition without prejudice on June 4, 1998. *United States v. Rubin*, 118 S. Ct. 2080 (1998).

facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." Pet. App. 7a (quotation omitted). Here, the court stated, the Secret Service's argument was based upon nothing more than speculation. *Id.* at 8a.

The court of appeals noted, moreover, that two of the three former Presidents who have publicly expressed their views (Presidents Ford and Carter) have concluded that there should be no such privilege in criminal proceedings. Pet. App. 8a. The court also concluded that the President would not be inclined to push away his protectors. He is under a statutory duty to accept such protection, *see* 18 U.S.C. § 3056(a), and "the President has a profound personal interest in being well protected." Pet. App. 8a.

The D.C. Circuit went on to observe that the Secret Service's argument was "weakened" by the form of the proposed privilege. Pet. App. 9a. "An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events . . . must remain secret." *Id.* The court explained that the proposed exception for contemporaneously recognizable felonies undermines the policies that the Secret Service has asserted and thus "strikes a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.* The court continued:

> On the one hand, because the President cannot know whether an agent will realize he is witnessing the commission of a felony—which depends in part upon how much the agent knows about prior events—the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same). On the other hand, the exception would prohibit testimony (and thus thwart the search for truth) even in cases where the evidence, viewed in the light of subsequent events, would supply a key element in the proof of a serious crime.

Id.

The D.C. Circuit also found it significant that the Secret Service does not require agents to sign a confidentiality agreement, which means that the Secretary cannot ensure the confidentiality of information held by former agents. "If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seem anomalous that the Service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given." Pet. App. 10a.

The efficacy of the proposed privilege, the court found, was also "undermined" in that it was not vested in the President, whose behavior the privilege is designed to affect. The court stated that "we know of no other privilege that works that way. If the person whose conduct is to be influenced knows that the privilege might be waived by someone else, the effect of the privilege in shaping his conduct is greatly diminished if not completely eliminated." Pet. App. 10a.

Furthermore, an incumbent President's ability to control the privilege "would end when the President leaves office." Pet. App. 10a. And thus the privilege cannot serve its asserted purpose because "disclosures by Secret Service agents after the President leaves office [may] be as feared as disclosures during his incumbency." *Id.* at 11a.

The court found yet another anomaly in that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. In addition, the court recognized that Secret Service agents had testified in the past and "disclosed observations from their protective experiences

in books, apparently without causing Presidents to distance themselves from their protectors." *Id.*

The court also pointed to Section 535(b) of title 28, which requires that any "information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the appropriate federal law enforcement official. The court found that, at a minimum, Section 535(b) "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.' That policy weighs against judicial recognition of the privilege proposed here." Pet. App. 13a.

4. The court of appeals denied a petition for rehearing and a suggestion for rehearing en banc. Pet. App. 29a. The court explained that "no judge on the court has even requested a vote on the Justice Department's suggestion for rehearing *en banc*." Pet. App. 36a.

The court also denied the Secret Service's application for a stay pending the filing of a petition for a writ of certiorari. The court stated that the Secret Service "has not made a sufficient showing that irreparable harm will result unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 35a-36a. The harm asserted is "future harm, depending on a prediction about what the President will do in the absence of the privilege." *Id.* at 36a. But the Court recognized: "If harm of the sort the Department envisions is now occurring, it therefore must be because the President does not believe the Supreme Court will sustain the privilege. Neither a stay nor an order under the All Writs Act can alter or prevent that alleged harm. Testimony today by Secret Service agents regarding past events cannot change our ruling. And such testimony cannot affect how the Supreme Court will rule." *Id.*

ARGUMENT

The novel privilege asserted by the Secret Service has been thoroughly analyzed by the district court and by the court of appeals. All four judges to consider the privilege claim have flatly rejected it. Indeed, despite the Secret Service's forcefully worded suggestion for rehearing en banc, not a single judge on the D.C. Circuit even called for a vote. This deafening silence refutes petitioners' speculation that the panel's ruling would result in a serious risk of harm. Pet. App. 36a.

There is a good explanation for the unanimity of the federal judges who have examined the question. As a matter of law, history, and policy, the Secret Service's claim is meritless. No case, statute, regulation, rule, or agency opinion—*ever*—has concluded that there is (or even should be) a protective function privilege. And this Court has consistently refused to recognize privileges unrooted in historical or contemporary practice. That is particularly true where, as here, a federal statute affirmatively requires the disclosure of information that falls within the asserted common-law privilege. *See* 28 U.S.C. § 535(b).

What is more, the relevant policy considerations point decisively against this previously unheard-of privilege. Secret Service officers and agents are law enforcement officers sworn to enforce and uphold the law. They work for the people of the United States, who have a bedrock interest in detecting and prosecuting federal crimes, particularly crimes committed by high government officials. The speculation that Presidents might "push away" Secret Service officers and agents absent a privilege in criminal proceedings assumes that Presidents will both violate their legal obligation to accept protection and risk their own lives unnecessarily. It also rests on the discredited notion that Presidents can prevent other government officials from testifying about the President's acts and communications. *Cf. Nixon*, 418 U.S. at 683.

For those reasons, the petition should be denied.

I

At the outset, we emphasize the compelling national interest in prompt completion of this grand jury investigation. All parties agree: This criminal investigation should be concluded sooner rather than later. At this time, moreover, there is a particularized need for expedition.

The need for expedition is of greatest importance with respect to the Secret Service's stay application. As the court of appeals specifically explained, two separate reasons demonstrate why there is no basis for a stay (even if the Court determines that the legal question presented in the petition for a writ of certiorari warrants review).

First, there is no possibility of any harm, much less irreparable harm, if a stay is denied. If the point of this litigation is what the Secret Service says it is—to obtain a definitive determination that there is a "protective function privilege"—then denial of a stay causes no harm at all. Whether this Court denies or grants certiorari, the Secret Service soon will have a definitive ruling. And we have no intention of taking any action that would cause this litigation to become moot. We have not issued (and pending completion of the appellate process, will not issue) subpoenas to all of the individuals whose testimony is at stake in the motion to compel. Thus, denial of the stay will in no way cabin the ability of this Court to review the decision of the court of appeals.

Moreover, at least until this Court issues a final ruling, we will not question any officers and agents about on-duty "protective-function" observations that occur on or after this date. As a result, there could not be *any* conceivable current Presidential pushing away caused by denial of the stay—even if the petition for certiorari is granted.

Second and independently, we respectfully suggest that there is no significant possibility of reversal of the D.C.

Circuit's decision. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). As the D.C. Circuit stated, "the Justice Department's likelihood of success before the Supreme Court is insufficient to warrant further delay in the grand jury's investigation" and "it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 36a. The lack of merit is important, for "there is no good reason for allowing a stay of the judgment below if it is certain to be affirmed, even if the case is worthy of Supreme Court review because of . . . the public importance of the question presented." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 693 (1993) (emphasis added). Therefore, even if the Court determines that this issue is of sufficient public importance that it must grant plenary review, there nonetheless is no reasonable prospect of reversal and thus no basis for a stay.

For both of those two alternative and independent reasons, the Court should deny the Secret Service's application for a stay—regardless whether it grants the petition for a writ of certiorari.

II

The petition should be denied because of the need for expeditious completion of this investigation and because the privilege asserted in this case lacks any merit. Three separate sources of law contravene the privilege claim: this Court's traditional considerations under Federal Rule of Evidence 501, the statutory disclosure obligations imposed by Section 535(b) of title 28, and an assortment of compelling public policy considerations. Moreover, as the court of appeals emphasized, the Secret Service's privilege claim on its own terms is internally inconsistent and logically incoherent. For those reasons, further review is unwarranted.

As the Secret Service notes, we previously sought certiorari before judgment. We did so in order to expedite

this investigtaion and because we firmly believed that the Secret Service would not back down from seeking this Court's review even in the face of a decisive defeat in the court of appeals. Our fears were well-founded, for the Secret Service has persisted in championing a privilege claim that has been roundly rejected in the court of appeals. The Solicitor General, on behalf of the Secret Service, nonetheless implies that we are somehow estopped from opposing this petition because of our earlier petition for certiorari before judgment. Pet. 12. He is wrong. A denial of certiorari from this Court, coupled with *no* prospect of any further lower court litigation, *will* constitute the "final ruling" with "moral authority and public credibility" that will end this meritless privilege litigation. *Cf.* Pet. 13. And all we have ever sought (unlike the Solicitor General, who did not support certiorari before judgment for reasons that remain unclear) is the quickest possible *final* ruling. At this point, that means a denial of the petition.

1. Under Rule 501, privileges are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Under this common-law standard, "courts have historically been cautious about privileges," *Nixon*, 418 U.S. at 710 n.18, because they obstruct the search for truth and "contravene the fundamental principle that the public has a right to every [person's] evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (quotation omitted). A privilege applies only where it is "necessary to achieve its purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "promotes sufficiently important interests to outweigh the need for probative evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (quotation omitted).

This Court has emphasized the important distinction under Rule 501 between determining the scope of an existing privilege, and creating an altogether new one. *See Swidler & Berlin v. United States*, No. 97-1192, 1998 WL 333019, at *7 (June 25, 1998). This Court's privilege decisions establish that the federal courts should not recognize a new privilege under Rule 501 unless it is (i) supported by important public policy considerations and (ii) either historically rooted in law or accepted by a vast majority of States. Thus, the Court has embraced only one new evidentiary privilege since the adoption of Rule 501, and has rejected numerous others. *See Jaffee*, 518 U.S. 1 (recognizing psychotherapist-patient privilege);[2] *University of Pennsylvania*, 493 U.S. 182 (rejecting privilege for academic peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for "legislative acts" by state legislator); *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting "editorial process privilege").

The "protective function privilege" does not meet these requirements for a new federal privilege. It has never been recognized, cited, or even discussed by any legal authority. Indeed, as far as we are aware, nothing resembling the "protective function privilege" has ever been recognized in any body of law. It also is conspicuously absent from the list of privileges proposed to Congress in 1974, and upon which this Court relied in *Jaffee*, 518 U.S. at 13-14, and *Gillock*, 445 U.S. at 367-68.

In addition, the law enforcement officers who protect state governors and other officials have been called upon to testify about their protectees. *See, e.g., Mecham Aide Testifies at Impeachment Trial*, N.Y. Times, Mar. 3, 1988, at A19. The law enforcement responsibilities of those state law-enforcement bodies that are analogous to

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[2] In recognizing a new federal psychotherapist privilege, the Court in *Jaffee* relied on the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," reasoning that the "consensus among the States" counseled in favor of Rule 501 recognition. *Jaffee*, 518 U.S. at 12. Moreover, the privilege had been one of the nine privileges contained in the proposed Federal Rules.

the Secret Service thus provide no support to the Secret Service's claim.

In this case, as in *University of Pennsylvania* and many others, the asserted "protective function privilege" is thus unavailing because it has no "historical or statutory basis." 493 U.S. at 195. The Secret Service should turn to Congress with its policy arguments, for this Court has oft stated "[t]he balancing of conflicting interests" when the privilege lacks historical or state law support "is particularly a legislative function." *Id.* at 189.

2. Even apart from its failure to satisfy traditional Rule 501 requirements, the Secret Service's privilege claim fails for a separate reason. Section 535(b) of title 28 requires that "[a]ny information" that government officers such as Secret Service personnel possess "relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the proper federal law enforcement official (in this case the Independent Counsel).[3] The official undertaking such an investigation is to have "*complete cooperation* from the department or agency concerned." H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552.

The import of Section 535(b) is clear: The chief federal law-enforcement officer (here, within his limited jurisdiction, the Independent Counsel, *see* 28 U.S.C. § 594(a)) is to receive complete cooperation and free access to all units of the Executive Branch, unless some overriding constitutional privilege applies. A statute such as Section 535 that sets forth a right of access or disclosure precludes judicial recognition of a contrary *common-law*

[3] Section 535(b) requires that the information in question be reported to the Attorney General unless "the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law." 28 U.S.C. § 535(b)(1). Here, the responsibility to perform this investigation has been assigned to the Independent Counsel under 28 U.S.C. § 594(a) and the Special Division's order of January 16, 1998.

privilege. In *University of Pennsylvania*, for example, Title VII authorized government access to information relevant to a discrimination charge. The Court rejected a peer-review privilege claim, stating that the Title VII provisions "[o]n their face . . . do not carve out any special privilege relating to peer review materials." 493 U.S. at 191.

Similarly, in *Arthur Young*, Section 7602 of title 26 granted the IRS a right of access to an accountant's papers. The Court rejected an accountant's work-product claim, stating that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, not this Court, to make." 465 U.S. at 816-17.

Arthur Young and *University of Pennsylvania*, when combined with Section 535's text and history, flatly refute the Secret Service's *common-law* privilege claims.

Even if Section 535(b) were not dispositive, it at least "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.'" Pet. App. 13a. As the court of appeals explained, "[t]hat policy weighs against judicial recognition of the privilege proposed here." *Id.* Similarly, the district court found that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Moreover, Section 3056(a) of title 18 authorizes the Secret Service to protect the President and requires the President to accept its protection. As the district court observed, Congress mandated protection of the President but has not created a "protective function privilege," further supporting the conclusion that Section 535(b) should be interpreted according to its terms. Pet. App. 18a.

3. Turning to policy, the Secret Service's principal argument for recognition of its privilege is that testimony by its personnel would inevitably cause a President to push away his security detail. That speculative prediction has found no adherents in the federal judiciary. Even apart from the decisive flaws in the Secret Service's argument (the lack of historical or contemporary support for the privilege and the obligation imposed by Section 535), an impressive list of compelling policy and logical reasons convincingly demonstrates that the Secret Service's speculative argument lacks merit.

First, as the court of appeals stated, Section 3056(a) *requires* that the President accept the proximity-based protection that the Secret Service is obliged to give him. Pet. App. 8a. A common-law privilege should not be created out of whole cloth on the assumption that the President otherwise would flout a statutory obligation.

Second, a President has a strong personal interest in his own life. As Chief Judge Johnson explained, therefore, it is hard to understand why a law-abiding President would push away his protectors in situations where there is a plausible fear of attack simply because of the lack of a protective function privilege. Pet. App. 24a.

Third, as the court of appeals explained, the President has ample privacy within the White House compound—the place where he is most likely to commit crimes or acts relevant to a criminal investigation or prosecution. Pet. App. 11a. And historically, the dangers to the President have increased when he is in crowd situations outside the White House. So the lack of the "protective function privilege" would not meaningfully deter the President who wished to take care to commit criminal or wrongful acts in the White House.[4]

[4] The Secret Service's coded suggestion that Congress has mandated "unremitting intrusion into the most intimate aspects" of the President's life is wrong. Pet. 4.

Fourth, the lack of a "protective function privilege" should have no effect on the President who "act[s] within the law," for such persons "do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." Pet. App. 23a. Indeed, the district court found the contrary argument "simply not plausible." *Id.*

Fifth, numerous officers and agents have recounted what are now claimed to be "privileged" observations in widely published books. Pet. App. 11a, 23a. Yet we are not aware of, and the Secret Service has not offered, any indication that any of these published accounts has caused a President to distance himself from his protectors.

Sixth, the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment. *See* Pet. App. 9a-10a. Thus, a retired officer has no legal restriction preventing him from disclosing information, even if there were a protective function privilege. The lack of such an agreement simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim that is preventing disclosure of highly relevant Secret Service testimony in this criminal investigation.

Seventh, the President controls the privilege only while he is in Office. Termination of control over the privilege after the President leaves office—but while the President is alive and subject to criminal liability—shows that the privilege cannot meet its stated goals even if it were recognized. *Cf. Swidler & Berlin*, 1998 WL 333019, at *5 ("Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."). This fact "weakens the claim that the privilege in the form proposed by the Secret Service will do anything to diminish the President's incentive to keep his protectors at a distance." Pet. App. 10a-11a.

Eighth, two former Presidents (Ford and Carter) have stated that there should be no protective function privi-

lege in criminal proceedings. *See* Pet. App. 8a. These statements by former Presidents sharply undercut the Secret Service's argument that Presidents would push away without this asserted privilege. (Former Attorneys General Bell, Meese, Thornburgh, and Barr also filed an amicus brief in the court of appeals emphatically opposing the asserted privilege.)

Ninth, under the Secret Service's theory, observations of the President become more sacrosanct than the constitutionally protected Presidential communications and deliberations that fall within the executive privilege. Given that the presidential communications privilege was found by this Court to be "fundamental to the operation of Government," yet overridden by the need for relevant evidence in criminal proceedings, the Secret Service's proposed privilege would create an irrational asymmetry in the law. *Cf. Nixon*, 418 U.S. at 707-13.

Tenth, under the Secret Service's theory, testimony about a President who has committed a contemporaneously recognizable felony would *not* be privileged whereas testimony about observations that constitute mere *evidence* of a felony would be. But if testimony about contemporaneously recognizable felonies will not cause "pushing away," how can testimony about evidence of felonies not recognized as such (or of misdemeanors) cause pushing away? Pet. App. 9a. In the end, there is not much to say about this gerrymandered privilege except that it strikes what the court of appeals charitably called "a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.*

In sum, as to policy, the proposed privilege would have the effect of forcing sworn law enforcement officers to remain silent while in possession of evidence that could affect serious federal criminal proceedings. And it would construct a rule premised on the assumption that a President of the United States, bound by his constitutional

oath, has a legitimate interest in engaging in criminal activity without fear of disclosure by his Secret Service personnel. Thus, even apart from the dispositive legal flaws in the Secret Service's privilege, it also lacks a coherent policy rationale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel
JOSEPH M. DITKOFF
BRETT M. KAVANAUGH
Associate Independent Counsel
1001 Pennsylvania Ave., N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

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In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

EDWARD S. KNIGHT
General Counsel
Department of the Treasury
Washington, D.C. 20220

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REPLY BRIEF FOR THE PETITIONERS

Petitioners seek this Court's review to determine whether, under Rule 501 of the Federal Rules of Evidence, a protective function privilege should be recognized in response to grand jury subpoenas for the testimony of Secret Service agents and officers concerning information they learned while in proximity to the President of the United States for the purpose of protecting him. The Independent Counsel has opposed the petition based on two rationales: (1) there is "the compelling national interest in prompt completion" of his ongoing grand jury investigation (Br. in Opp. 12; see *id.* at 13); and (2) the privilege asserted, in his view, lacks merit (*ibid.*). The Independent Counsel's reasoning is unsound, and it ignores the important role that the relationship of trust and confidence plays in protecting the safety of those who hold the Office of the President, which is an institutional interest of the highest order.

1. The Independent Counsel urges that "[t]he petition should be denied because of the need for expeditious com-

pletion of [his] investigation." Br. in Opp. 13. There is no longer any basis for that argument. The Chief Justice has denied petitioners' application for a stay pending resolution of the petition for a writ of certiorari, reasoning that "if the Secretary's claim of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future." *Rubin* v. *United States, Acting through the Independent Counsel*, No. A-53 (98-93) (July 17, 1998) (Rehnquist, Circuit Justice), slip op. 1. Since the denial of the stay, the Independent Counsel has obtained the full cooperation of the Secret Service in providing testimony that would fall within the protective function privilege.

In light of that cooperation, the Court's consideration of the issue presented will not interfere with the Independent Counsel's ongoing investigation. To the contrary, the denial of a stay enables the parties and the Court to focus their attention on the long-term consequences of the issue at stake in this litigation, rather than on its immediate consequences for the parties. Those long-term consequences are precisely what have motivated the Secretary of the Treasury, the Director of the Secret Service, and the Attorney General throughout this litigation: If the courts refuse to recognize the protective function privilege, the resulting destruction of the relationship of confidence and trust between a President and his protectors will seriously impair the Service's future ability to protect those who serve as the Nation's Chief Executive. See Pet. App. 37a-95a (Declarations of Director Merletti, former Directors Eljay B. Bowron and John W. Magaw, and Secretary Rubin). That fundamental concern remains one of great importance warranting review of the case by this Court, and the parties and the Court are now in a position to address it in the fully deliberative manner that an issue relating to the safety of the President of the United States plainly deserves, separated from the pressures occasioned by the imperatives of the ongoing investigation. Indeed, the Chief Justice, even as he denied our application for a stay, observed that "[t]his case is obviously not a run-of-the-mine dispute, pitting as it does the prosecution's need for testimony before a grand jury against claims involving the safety and protection of the President of the United States," and he "assume[d], without deciding, that four members of this Court on that basis would grant certiorari." Slip op. 2.*

2. On the merits, the Independent Counsel argues that recognition of a protective function privilege here would be inconsistent with (a) "this Court's traditional considerations under Federal Rule of Evidence 501"; (b) "the statutory disclosure obligations imposed by Section 535(b) of title 28"; and (c) "an assortment of compelling public policy considerations." Br. in Opp. 13. The Independent Counsel's arguments are incorrect, and individually and in combination they provide no persuasive reason for denying the petition.

a. The Independent Counsel argues that the protective function privilege is not justified under the "traditional considerations" governing Rule 501 because the privilege is not "either historically rooted in law or accepted by a vast majority of States." Br. in Opp. 14-16. The court of appeals rejected that argument, and properly so. As the court of appeals explained:

> [T]he OIC makes much of the lack of relevant federal or state precedent for the protective function privilege. The lack of such precedent is hardly surprising,

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* Consistent with that view of the effect of disclosure of past events, and to minimize any incentive for the President to distance himself from Secret Service agents and officers in the future, the Independent Counsel has undertaken, at least until this Court issues a final ruling, not to question agents and officers about on-duty "protective function" observations that occur after the date on which the brief in opposition was filed. See Br. in Opp. 12.

> however, in view of the novelty of the OIC's demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President. Although analogies can be drawn to state Governors and their protectors, the consequences of assassination (and hence the necessity of suitable protection) are so much greater at the presidential level that such analogies offer little guidance. In these circumstances, we do not regard the absence of precedent as weighing heavily against recognition of the privilege.

Pet. App. 6a. The question therefore is whether the privilege should now be recognized in order to safeguard the relationship of trust and confidence between the President and those charged by Act of Congress with protecting his life and safety. The record in this case, consisting of the sworn declarations of the current Director of the Secret Service and his two immediate predecessors, firmly establishes the basis for the privilege. That record is uncontradicted, because the Independent Counsel chose to introduce no evidence whatever to the contrary.

b. The Independent Counsel next argues that the protective function privilege is not available for the "separate reason" that Section 535(b) would require disclosure of information that Secret Service personnel have "relating to violations of title 18 involving Government officers and employees" (28 U.S.C. 535(b)) to the Independent Counsel. Br. in Opp. 16. The court of appeals, however, did not resolve whether the Independent Counsel's construction of Section 535(b) is correct. Pet. App. 13a. The court of appeals had good reason to avoid the question, because Section 535(b) sheds no light on the protective function privilege.

Section 535(b) imposes, on "the head of the department or agency," an affirmative obligation to report the specified information to the Attorney General. Any such reporting could have no effect on the ability of the government to assert a privilege, including a protective function privilege, because the officer to whom the information must be reported—the Attorney General—is herself the lawyer for the Executive Branch. Indeed, it is the Attorney General who ordinarily is responsible for deciding (after weighing the relevant considerations) whether to assert or waive a governmental privilege in litigation. And here, the Attorney General has specifically determined that the privilege should be asserted. Cf. 28 U.S.C. 535(b)(2) (exemption from reporting requirement where "the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint").

Moreover, Congress enacted Section 535(b), long before Congress created the Office of Independent Counsel, to clarify whether the Attorney General may investigate "alleged irregularities on the part of Government officers and employees." H.R. Rep. No. 2622, 83d Cong., 2d Sess. 3 (1954). Its background therefore does not suggest that it was intended to address any question of privilege. Nothing in the policies and purposes of Section 535(b), for example, suggests that when a government agency provides in-house psychotherapists to counsel agency employees, a privilege may not be recognized that would permit those psychotherapists to decline to disclose information learned in the course of ostensibly confidential counseling sessions. See *Jaffee* v. *Redmond*, 518 U.S. 1 (1996). Section 535(b) similarly does not speak to the protective function privilege at issue here. Rather, in enacting that provision, Congress continued to leave the question of the assertion of privileges to the Attorney General. See Pet. 25 n.3.

c. The Independent Counsel recites a series of reasons why, in his view, the protective function privilege is not necessary. Br. in Opp. 13-20. The Independent Counsel's cursory recitation rests on speculation that has no foun-

dation in professional expertise and experience in safeguarding the life of the President. Indeed, the Independent Counsel's suppositions are at odds with sworn statements of persons who are directly responsible for protecting the President from assassination. See Pet. 15-17.

The Independent Counsel begins by suggesting that, in the absence of the privilege, the President would not push away his protectors because he has an obligation under 18 U.S.C. 3056(a) (1994 & Supp. II 1996) to accept Secret Service protection. Br. in Opp. 18. The creation of the statutory obligation to accept Secret Service protection, however, does not resolve every detail of that protection or purport to address the subtle (and often unconscious) interactions between the President and the individual agents and officers who are assigned to protect him. Furthermore, 18 U.S.C. 3056(a) necessarily grants the President a measure of discretion, both as protectee and as the constitutional officer ultimately responsible for faithful execution of the laws.

The Independent Counsel also argues that the President will not push away his protectors because he should have a strong personal interest in his own safety. Br. in Opp. 18. History establishes, however, that Presidents do not adequately assess their own security needs, and as Director Merletti explained, "even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President." See Pet. App. 57a; Pet. 18-19. Similarly, there is no merit to the Independent Counsel's argument that the President has "ample privacy within the White House compound." Br. in Opp. 18. The court of appeals did not limit its rejection of the protective function privilege to Secret Service officers posted within the White House. Furthermore, as we explain in the petition, the President has faced serious threats to his safety at the White House as well as when traveling. Pet. 19-20.

The Independent Counsel additionally contends that the protective function privilege "should have no effect on the President who 'act[s] within the law.'" Br. in Opp. 19. That argument overlooks the fact that a President may legitimately seek to maintain confidentiality about matters that are entirely lawful, including matters affecting sensitive personal, family, or political concerns. The Independent Counsel has never suggested that questioning of Secret Service agents and officers before the grand jury, in this or future investigations, would be limited to observations of criminal misconduct. To the contrary, under the standards that govern grand jury investigations as a general matter, prosecutors and grand jurors may inquire into matters that are only tangentially relevant to the subject of their investigations. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (a grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not").

The Independent Counsel relies on the fact that the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment and that, as a result, some Secret Service agents have recounted privileged observations without sanction. Br. in Opp. 19. As we explain in the petition, the Secret Service has heretofore relied on a professional code of honor to maintain confidences, and the rarity of violations during a century of Secret Service protection underscores the extent to which a President may justifiably rely on adherence to that code by both current and former agents and officers even in the absence of confidentiality agreements. Pet. 20-21. There is, in any event, no basis for the Independent Counsel's extraordinary assertion that Secret Service's reliance on a code of honor "simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim." Br. in Opp. 19.

The Independent Counsel argues that a President's inability to control the privilege after he leaves office "shows that the privilege cannot meet its stated goals." Br. in Opp. 19. That is not so. As explained in our petition, a former President has no legal right to exercise personal control over an institutional privilege, but he can reasonably anticipate that future Presidents will respect the Secret Service's ongoing institutional need to preserve every past President's expectation of confidentiality in order to ensure a future relationship of confidence and trust. Pet. 23-24.

The Independent Counsel, like the court of appeals, also relies on statements by former Presidents Ford and Carter, outside the record, respecting the need for a protective function privilege. Br. in Opp. 19-20. Contrary to the Independent Counsel's representations, those Presidents did not state that "there should be no protective function privilege in criminal proceedings." *Ibid.* Rather, President Ford, whose views President Carter endorsed, appeared to support a qualified privilege, based on a court's "judgment as to what is a legitimate area" of inquiry in criminal cases. See Transcript of *Hardball with Chris Mathews* (CNBC television broadcast, June 4, 1998).

The Independent Counsel is additionally mistaken in suggesting that the protective function privilege would be in "irrational asymmetry" with the executive privilege at issue in *United States* v. *Nixon*, 418 U.S. 683 (1974). Br. in Opp. 20. There is no reason why two distinct privileges that are founded on different policy concerns should be coextensive. We urge that the protective function privilege, unlike executive privilege, should be absolute where it applies, but the protective function privilege involves a far narrower scope of application than executive privilege. It comes into play only in response to requests for Secret Service testimony concerning information that Secret

Service agents or officers have learned while in close proximity to the President for the purpose of protecting him.

Finally, contrary to the suggestion of the Independent Counsel (Br. in Opp. 20), there is no inherent contradiction between the rationale for the privilege and the limitation on the privilege proposed by the Secret Service. The Secret Service has determined, based on its assessment of the Secret Service's law enforcement responsibilities, that the privilege should not extend to a Secret Service agent's contemporaneous recognition of a felony. The primary responsibility of Secret Service agents assigned to protect the President is to ensure the President's safety and not to investigate the possible commission of crimes. Nevertheless, the Secret Service has concluded that the President should reasonably expect that, while the Secret Service would generally assert the protective function privilege to preserve the President's confidences, the Secret Service would not assert the protective function privilege if a Secret Service agent observed the President or another commit a felony. As we explain in the petition, that exception strikes a reasonable accommodation between a Secret Service agent's protective and law enforcement roles. Pet. 21.

3. The Independent Counsel has previously represented to this Court, in filing a petition for a writ of certiorari before judgment, that the claims of privilege in this case are of "paramount importance to the country," that "all readily agree that the physical safety of the President is a matter of urgent national and public concern," and that "only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is a sensitive, life-or-death issue." 97-1942 OIC Pet. (redacted version) 9-10. The Independent Counsel now attempts to characterize those unambiguous representations of his view of this Court's distinctive role in this case as merely predictions about whether the Se-

cret Service would continue to adhere to its professional judgment regarding the measures necessary to protect the safety of the President. Br. in Opp. 17. The Court's decision whether to grant the government's petition should not turn on such rhetorical contortions. The Independent Counsel was right the first time in taking the considered position that the privilege issue warrants review by this Court. We disagreed with him only on whether the issue warranted the extraordinary procedure of certiorari before judgment. The Court concluded that it did not and denied review "without prejudice." *United States* v. *Rubin*, No. 97-1942 (June 4, 1998). Now that the court of appeals has completed its expeditious review of the case, the matter is ripe for review by this Court.

The government seeks this Court's review based on real world considerations of presidential safety. The Secretary of the Treasury and the Director of the Secret Service have determined, based on professional judgment and experience set forth in the record, that the protective function privilege is needed to protect Presidents from an unacceptable risk of assassination. The Nation's long-term institutional interest in avoiding the calamitous consequences of that occurrence provides a compelling basis for recognizing the privilege. The question presented here warrants review by this Court.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

EDWARD S. KNIGHT
General Counsel
Department of the Treasury

AUGUST 1998

SUPREME COURT OF THE UNITED STATES

ROBERT RUBIN, SECRETARY OF TREASURY, ET AL. *v.* UNITED STATES, THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98–93. Decided November 9, 1998

The petition for a writ of certiorari is denied.

JUSTICE GINSBURG, dissenting from the denial of certiorari.

I agree with JUSTICE BREYER that this Court, and not a Court of Appeals, ought to be the definitive judicial arbiter in this case. The matter is grave and the competency of the Judiciary (as opposed to the Legislature) to craft the privilege in question is genuinely debatable. Today's disposition, I note, does not in any sense constitute a ruling on the merits of the issue presented. See, *e.g.*, *Equality Foundation of Greater Cincinnati, Inc.* v. *Cincinnati*, 525 U. S. ___ (1998) (STEVENS, J., respecting denial of certiorari).

JUSTICE BREYER, dissenting from the denial of certiorari.

This petition raises the question whether federal law recognizes a special Secret Service evidentiary privilege which, in effect, would permit a Secret Service agent protecting the President to refuse to testify unless he saw or heard conduct or statements that were clearly criminal. To put the matter more precisely, the Secret Service claims a privilege that would protect

> "information obtained by Secret Service personnel while performing their protective function in physical proximity to the President,"

except that it would not apply

> "in the context of a federal investigation or prosecution, to bar testimony by an officer or agent concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony has been, is being, or will be committed." *In re: Sealed Case*, 148 F. 3d 1073, 1075 (CADC 1998) (internal quotation marks omitted).

The Court of Appeals denied the existence of such a privilege. The Secretary of the Treasury asks this Court to review that determination.

I believe the question is important and that this Court should grant review. The physical security of the President of the United States has a special legal role to play in our constitutional system. The Constitution vests the entire "Power" of one branch of Government in that single human being, the "President" of the United States. Art. II, § 1, cl. 1. He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes. And he is responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch or the entire Judiciary for those of the Judicial Branch. He has been called "'the sole indispensable man in government.'" *Jones* v. *Clinton*, 520 U. S. 681, 713 (1997) (BREYER, J., concurring in judgment) (quoting P. Kurland, Watergate and the Constitution 135 (1978)). Thus, one could reasonably believe that the law should take special account of the obvious fact that serious physical harm to the President is a national calamity—by recognizing a special governmental privilege where needed to help avert that calamity.

Moreover, the federal courts themselves have adequate legal authority to develop an evidentiary privilege that

will materially help to ensure the physical safety of the President. Federal Rule of Evidence 501 says that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This Court has held that this Rule "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges." *Jaffee* v. *Redmond*, 518 U. S. 1, 9 (1996) (internal quotation marks omitted). See also *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 804, n. 25 (1984) ("Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them"). The Court has suggested that a privilege will apply where permitting a refusal to testify serves "'a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel* v. *United States*, 445 U. S. 40, 50 (1980) (quoting *Elkins* v. *United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting)). The Court of Appeals recognized that the President's physical safety amounts to the kind of transcendent public good that, in principle, might justify the recognition of a new privilege here, *In re: Sealed Case*, *supra*, at 1076, just as important public need has led the courts to recognize new privileges in other cases, *Jaffee* v. *Redmond*, *supra*; *Upjohn Co.* v. *United States*, 449 U. S. 383, 394–95 (1981) (extending attorney-client privilege to cases involving communication between a corporation's employees acting at the direction of its officers and the corporation's attorney); *Totten* v. *United States*, 92 U. S. 105, 107 (1876) (state secrets privilege); cf. 8 J. Wigmore, Evidence §§ 2290, 2333 (J. McNaughton rev. 1961) (explaining how common-law courts developed lawyer-client

privilege and spousal privilege between the 16th and 19th centuries).

I concede that this Court, when analyzing a new claim of privilege, has looked to the ability of the privilege to win acceptance in federal courts and other jurisdictions. *Jaffee* v. *Redmond*, *supra*, at 12–13; *Trammel* v. *United States*, *supra*, at 47–50. There is no precedent for the privilege claimed in this case. But, as the Court of Appeals pointed out, the lack of precedent is "hardly surprising," for this "appears to be the first effort in U. S. history to compel testimony by agents guarding the President." *In re: Sealed Case*, 148 F. 3d, at 1076. For that reason, the Court of Appeals decided that "the absence of precedent" did not "weig[h] heavily against recognition of the privilege." *Ibid.* In my view, that determination was correct.

Further, there are strong reasons for believing that a President's physical safety requires the nearby presence of Secret Service agents. The terrible truth, as we all know, is that assassins have killed four American Presidents and have wounded one other. Nine Presidents have been the subject of assassination attempts, including attempts that have taken place while the President was in the White House itself. In addition, a would-be assassin fired a pistol at President-elect Roosevelt three weeks before his inauguration, and the United States has accused a foreign government of planning the assassination of former President Bush when he visited Kuwait in 1993. See Appendix, *infra*, at 9.

History also teaches that the difference between life and death can be a matter of a few feet between a President and his protectors. President McKinley, for example, standing in a receiving line at the Pan American Exposition in Buffalo, was approached by an assassin, gun in hand hidden under a handkerchief. A Secret Service agent next to the President, and noticing the handkerchief, might have stopped the assassin. But there was no

agent next to the President, for exposition officials had requested those places. The assassination succeeded. N. Y. Times, Sept. 7, 1901, p. 1, col. 2; App. to Pet. for Cert. 42a.

By way of contrast, when John Hinckley fired shots at President Reagan, a Secret Service agent next to the President immediately pushed the President toward a limousine, another pushed the two men into the car, and a third spread his arms and legs to protect the President (and was hit in the chest). The President's life was saved. P. Melanson, The Politics of Protection: The U. S. Secret Service in the Terrorist Age 186 (1984) (hereinafter Melanson). When a woman pointed a loaded semiautomatic pistol at President Ford, a Secret Service agent standing next to the President quickly grabbed the weapon with one hand and the woman's arm with the other. After another agent shouted a code warning, two agents grabbed the President and others swiftly surrounded him as they escorted him away. N. Y. Times, Sept. 6, 1975, p. 1, col. 8. Only two weeks later, a shot was fired at President Ford in San Francisco. The President was immediately shielded and hustled into his limousine. N. Y. Times, Sept. 23, 1975, p. 1, col. 8.

As these examples indicate, the Secret Service seeks to surround a President with "an all-encompassing zone of protection," such that agents, once alerted, can form a human shield within seconds. App. to Pet. for Cert. 41a. The Secret Service submitted undisputed affidavits stating that it cannot carry out this strategy effectively unless agents are near, and often next to, the President. *Id.*, at 37a–93a.

Even when the President is at the White House, the need for protection, and the corresponding need for agents to stay close to the President, does not disappear. A man unknown to President Carter visited him at the Oval Office. During the Reagan administration, a man on the

Secret Service's list of dangerous persons, and with a history of mental disorders, reached the Oval Office without being stopped. Melanson 92. And as noted above, shots were fired at the White House when President Clinton was there. Even though the President was in the private residence at the time, agents fell upon the President within seconds to cover him and move him away from windows. App. to Pet. for Cert. 57a–58a.

Finally, I turn to what the Court of Appeals considered the key question in dispute: Is there a significant likelihood that, without the evidentiary privilege, Presidents too often will keep agents at a distance? The words "too often" are important here. No one believes that the President would refuse protection outright. He cannot do so according to law. 18 U. S. C. §3056(a). But no law can prescribe the President's attitude toward security. No law can dictate how faithfully the President follows the Secret Service's advice regarding security measures. And Presidential security may turn on close questions of degree. The Court of Appeals recognized that the matter was one of degree. It concluded that the Secretary had not shown the benefits of recognizing the privilege with sufficient force. Yet I believe this conclusion is open to significant doubt, particularly for the following two reasons.

First, the complexity of modern federal criminal law, codified in several thousand sections of the United States Code and the virtually infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law, make it difficult for anyone to know, in advance, just when a particular set of statements might later appear (to a prosecutor) to be relevant to some such investigation. Thus, without the privilege, a President could not count on privacy. Rather, he would have to assume, in respect to many Presidential conversations, some genuine risk that a nearby Secret Service agent might later have to divulge their contents.

At the same time there may well be conversations—perfectly lawful conversations, concerning, say, politics or personalities—which a President reasonably would not want divulged. Unless those conversations clearly fall within the bounds of "executive privilege," the bounds of which are unclear, cf. Memorandum for All Executive Department and Agency General Counsels, from Lloyd Cutler, Special Counsel to the President (Sept. 28, 1994), the only way a President could assure privacy would be to create a physical distance between himself and his Secret Service staff. The problem, in other words, arises in respect to ordinary conversations, not in respect to the unusual circumstance of an *obvious* crime.

Second, former President George Bush, several past and present directors of the Secret Service, and all of the now-living former Special Agents in Charge of the Secret Service detail assigned to protect the President, presented statements, either sworn or as amici, declaring that the absence of a privilege *will* cause the President to lose trust in his agents and keep them at a distance. This conclusion is plausible in light of human psychology that could lead Presidents to discount certain invisible dangers, such as the risk of assassination in surroundings that seem familiar and where all seems secure. Presidents may ignore those inherent dangers to some small degree, if they do not like having another individual, even an unobtrusive Secret Service agent, right next to them wherever they go. Presidents have not always eagerly accepted the omnipresence of their protectors. Politicians often feel the need to mingle with the public in a way that frustrates the Secret Service's goal of maintaining a controlled environment. And even for those who accept their protectors, enthusiasm can wear thin as the Service pervades the President's private as well as public life. Melanson 126. Franklin Roosevelt, for example, would try to elude his protectors. See Tays, Presidential Reaction to Security: A

Longitudinal Study, 10 Presidential Studies Quarterly 600, 601–02 (1980). President Truman summed up his attitude toward the Secret Service as follows: "'Kind and considerate as the Secret Service men were in the performance of their duty, I couldn't help feeling uncomfortable.'" *Id.*, at 603.

A delicate relationship exists between the President and his privacy-intruding protectors, one that may be particularly sensitive to the trust that comes from knowing that what the agents learn in the course of their duties will never be made public. That, in any event, is what the sworn statements set forth in the record and the briefs suggest. Those who provided those statements are in a position to know. It is difficult to characterize the statements as "speculation," *In re: Sealed Case*, 148 F. 3d, at 1076, particularly when the record contains nothing to the contrary.

The upshot, in my view, is that this Court should answer the question of whether some kind of protective privilege exists and determine its outlines, (whether, for example, it is waivable by the President). The matter is, as the Court of Appeals conceded, "fairly disputed." *Id.*, at 1079. It is legally uncertain. It is important. And only this Court can provide an authoritative answer.

The Independent Counsel at one point argued that "only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is sensitive, life-or-death issue." Pet. for Cert. in *United States* v. *Rubin*, O. T. 1997, No. 1942, p. 13 (redacted version). I agree. This Court, not a lower court, should decide this close legal question directly related to the physical security of the President of the United States.

I therefore dissent from the Court's denial of the writ.

Appendix to Opinion of BREYER, J.

Presidential Assassinations and Assaults

Date	President	Location	Method	Result
1/30/1835	Andrew Jackson	Washington	Pistol	Misfire
4/14/1865	Abraham Lincoln	Washington	Pistol	Killed
7/21/1881	James Garfield	Washington	Pistol	Killed
9/6/1901	William McKinley	Buffalo	Pistol	Killed
2/15/1933	Franklin Roosevelt (President-elect)	Miami	Pistol	Missed target
11/1/1950	Harry Truman	Washington	Automatic weapon	Assailants Intercepted
11/22/1963	John Kennedy	Dallas	Rifle	Killed
9/5/1975	Gerald Ford	Sacramento	Pistol	Misfire
9/22/1975	Gerald Ford	San Francisco	Pistol	Missed target
3/30/1981	Ronald Reagan	Washington	Pistol	Wounded
April 1993	George Bush (former President)	Kuwait	Bomb	Plot thwarted
10/29/1994	Bill Clinton	Washington	Assault rifle	Missed target

Sources: Kaiser, Presidential Assassinations and Assaults: Characteristics and Impact on Protective Procedures, 11 Presidential Studies Quarterly 545, 546–47 (1981); N. Y. Times, June 28, 1993, section A, p. 7, col. 2; N. Y. Times, Apr. 5, 1995, section A, p. 16, col. 5.